

1       STATE OF MINNESOTA                               DISTRICT  
2       COURT  
3       COUNTY OF RAMSEY                               SECOND JUDICIAL DISTRICT  
4       - - - - -

5       The State of Minnesota,  
6       by Hubert H. Humphrey, III,  
7       its attorney general,  
8       and  
9       Blue Cross and Blue Shield

10      of Minnesota,

11                               Plaintiffs,

12               vs.                               File No. C1-94-8565

13      Philip Morris Incorporated, R.J.

14      Reynolds Tobacco Company, Brown

15      & Williamson Tobacco Corporation,

16      B.A.T. Industries P.L.C., Lorillard

17      Tobacco Company, The American

18      Tobacco Company, Liggett Group, Inc.,

19      The Council for Tobacco Research-U.S.A.,

20      Inc., and The Tobacco Institute, Inc.,

21                               Defendants.

22      - - - - -

23                               DEPOSITION OF RICHARD M. LOWTHER

24                               Volume I, Pages 1 - 264

25

                              STIREWALT & ASSOCIATES  
                              P.O. BOX 18188, MINNEAPOLIS, MN 55418 1-800-553-1953

1                   (The following is the deposition of RICHARD  
2 M. LOWTHER, taken pursuant to Notice of Taking  
3 Deposition, under Rule 30.02(f), at the offices of  
4 Robins, Kaplan, Miller & Ciresi, 1801 K Street N.W.,  
5 Washington, D.C., commencing at approximately 8:32  
6 o'clock a.m., April 10, 1997.

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## 1 I N D E X

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5	16	Plaintiffs First Set of	
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14		8, 1994	145
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18		Bates 510310829-96	227
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20	REPORTER'S NOTE: Pages 82 through 93 are labeled		
21	"CONFIDENTIAL - QUESTIONS CONCERNING 4A INDICES" and		
22	will be disseminated only to counsel for Plaintiffs		
23	and counsel for Minnesota Defendants until further		
24	clarification of the Court.		
25			

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1 P R O C E E D I N G S

2 (Witness sworn.)

3 RICHARD M. LOWTHER

4 called as a witness, being first duly  
5 sworn, was examined and testified as  
6 follows:

7 ADVERSE EXAMINATION

8 BY MS. WIVELL:

9 Q. Would you tell the ladies and gentlemen of the  
10 jury your name?

11 A. Richard Lowther.

12 Q. Mr. Lowther, who are you employed by?

13 A. I work for Brown & Williamson Tobacco  
14 Corporation.

15 Q. Have you ever been deposed before?

16 A. No, I have not.

17 Q. How long have you been employed by Brown &  
18 Williamson?

19 A. I joined Brown & Williamson in April 1993.

20 Q. What's your current position?

21 A. I'm director of audit.

22 Q. What do you do as director of audit for Brown &  
23 Williamson?

24 A. I supervise the internal audits department. I  
25 also have responsibility for the risk management

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1 department.

2 Q. What does it mean to supervise internal audits?

3 A. The internal audit department has the  
4 responsibility to review internal controls within the  
5 company and has a staff of eight internal auditors  
6 who I direct/supervise.

7 Q. So the ladies and gentlemen can understand, what  
8 do you mean when you talk about internal controls?

9 A. Internal controls are anything that is done  
10 within the company to assure the achievement of  
11 business objectives.

12 Q. Can you give us some examples?

13 A. Some examples of controls may be, say today,  
14 supervision, budgets, reports, control-exception  
15 reviews, those kind of things.

16 Q. What is a control-exception review?

17 A. Well perhaps a review of the event of invoices  
18 which are not matched against purchase orders by a  
19 clerk within an accounts payable area, for example.

20 Q. Do you think you've told the ladies and  
21 gentlemen a pretty good synopsis of what you do with  
22 regard to internal controls?

23 A. I think I've given an overview.

24 Q. All right. Let's talk about risk management for  
25 a minute. What do you mean by risk management?

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1 A. Risk management department is responsible for  
2 the insurance portfolio for the company and its  
3 subsidiaries, and also for ensuring that there is a  
4 process within the company for reviewing business  
5 risk.

6 Q. And under that responsibility you're responsible  
7 for obtaining liability insurance; correct?

8 A. That's correct.

9 Q. And you're responsible also for analyzing risks  
10 to Brown & Williamson's profitability from the  
11 products it sells; correct?

12 A. No, I wouldn't characterize that as true, the  
13 latter part. I think that's the responsibility of  
14 management. Risk management's responsibility is to  
15 ensure that there are processes in place that address  
16 those issues.

17 Q. And by "those issues," you include liability  
18 from cigarette-related activities; right?

19 A. That is a business risk.

20 Q. And it falls within the risk management  
21 department that you're responsible for; correct?

22 A. The process of ensuring that there is management  
23 review of those risks is the responsibility of risk  
24 management.

25 Q. And that's a business process; correct?

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- 1 A. Yes.
- 2 Q. And as part of that business process, you
- 3 analyze the risk that arises from smoking-related
- 4 activities at Brown & Williamson; correct?
- 5 A. No, I wouldn't say that. I would say that line
- 6 management analyzes the business risk. Risk
- 7 management is responsible for ensuring that there is
- 8 a process for risks being considered appropriately by
- 9 line management.
- 10 Q. I'm sorry. Did you --
- 11 I have a bit of a hearing problem. Did you say
- 12 "land management?"
- 13 A. Line management.
- 14 Q. Line management. I'm sorry, I missed that.
- 15 What do you mean by "line management?"
- 16 A. Management in charge of operations within the
- 17 company.
- 18 Q. The executives at Brown & Williamson?
- 19 A. Right.
- 20 Q. Who's your immediate supervisor?
- 21 A. I report to Carl Schoenbachler, --
- 22 Q. Could you --
- 23 A. -- who is the CFO, Brown & Williamson.
- 24 Q. Do you have any employees under your direct
- 25 control?

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- 1 A. Yes, I do. I have eight internal audit staff,  
2 one administration assistant within audit, and a  
3 manager of risk management.
- 4 Q. They are called reports when they report to you.
- 5 A. Direct reports.
- 6 Q. Direct reports.
- 7 A. That's right.
- 8 Q. That's a term that's familiar at B&W; isn't it?
- 9 A. Yes, it is.
- 10 Q. By the way, do you call Brown & Williamson  
11 internally B&W?
- 12 A. That's generally accepted practice.
- 13 Q. Can we agree to accept that as a shorthand for  
14 Brown & Williamson today?
- 15 A. That's fine with me.
- 16 Q. Good.
- 17 What was your position of employment before  
18 you -- you became director of audit?
- 19 A. I was risk manager for a period before I assumed  
20 the position of director of audit.
- 21 Q. And how long did you hold that position?
- 22 A. Just slightly over a year.
- 23 Q. What did you do before that?
- 24 A. I was a manager within the internal audit  
25 department prior.

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1 Q. By the way, is --

2 You said that the line management manages the  
3 business risk relating to cigarette smoking; is that  
4 correct?

5 A. Yes.

6 Q. And that is a business decision or a business  
7 activity at Brown & Williamson; isn't it?

8 A. All business risks --

9 I mean business has risks, and management is  
10 responsible for controlling those, yes.

11 (Plaintiffs Exhibit 15 was marked  
12 for identification.)

13 BY MS. WIVELL:

14 Q. Sir, the court reporter is showing you what has  
15 been marked as Plaintiffs' Exhibit 15 in this  
16 litigation. Can you identify it?

17 A. How would you like me to identify it?

18 Q. Do you know what it is?

19 A. Yes, I do.

20 Q. What is it?

21 A. It's an amended notice of taking deposition.

22 Q. It's the amended notice of taking deposition for  
23 the deposition we're conducting today; correct?

24 A. Right.

25 Q. When did you first see it?

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1 A. I believe I saw it yesterday.

2 Q. And that's the first time you saw it?

3 A. I believe that's right.

4 Q. Do you understand that the deposition we're  
5 taking here today is pursuant to Rule 30.02(f) of the  
6 Minnesota Rules of Civil Procedure?

7 A. Yes, I do.

8 Q. And do you understand that Exhibit 1 requires  
9 Brown & Williamson to produce a person qualified to  
10 testify as to matters known or reasonably available  
11 to Brown & Williamson concerning the collection and  
12 productions of documents in the Minnesota tobacco  
13 litigation?

14 A. Exhibit 1 or Exhibit 15?

15 Q. I'm -- I'm sorry. Let me repeat the question.

16 Do you understand that Exhibit 15 requires Brown  
17 & Williamson to produce a person qualified to testify  
18 as to matters known or reasonably knowable to Brown &  
19 Williamson concerning the collection and production  
20 of documents produced in the Minnesota state tobacco  
21 litigation?

22 A. Yes, I do.

23 Q. Excuse me. Do you understand that the  
24 deposition -- the deposition notice is to Brown &  
25 Williamson?

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1 A. Yes.

2 Q. And do you understand that you have been  
3 designated as the corporate representative of Brown &  
4 Williamson to speak on its behalf at this deposition?

5 A. Yes, I do.

6 Q. And you understand that this deposition -- at  
7 this deposition you are speaking for Brown &  
8 Williamson?

9 A. Yes, I do.

10 Q. You've consented to speak for Brown & Williamson  
11 at this deposition today?

12 A. I have done that.

13 Q. And you understand that the testimony you give  
14 here is binding on Brown & Williamson?

15 A. I believe that's the case.

16 Q. Do you have authority to speak on Brown &  
17 William's half -- Brown & Williamson's behalf during  
18 this deposition today?

19 A. Yes, I do.

20 Q. So for the purposes of this deposition you're  
21 Brown & Williamson's spokesperson; aren't you?

22 A. I believe that's right.

23 Q. Do you understand that the answers which you  
24 give in this deposition to the questions I have asked  
25 must be answered fully based on not only what you

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1 know personally, but knowledge available to Brown &  
2 Williamson?

3 A. To the extent that I'm able to do that, that's  
4 right.

5 Q. I'm curious about why you qualified to the  
6 extent that you are able to do this. You understand  
7 you're speaking for Brown & Williamson; right?

8 A. Yes, I do.

9 Q. And you understand that --

10 Well let's put it this way: Have you made an  
11 investigation beyond your personal knowledge about  
12 the production and collection of documents in this  
13 case?

14 A. Yes. I've prepared to come here and present my  
15 deposition today.

16 Q. I'm not sure you answered my question. My  
17 question is: Have you made a personal investigation  
18 into the process of collection and production of  
19 documents that were produced in this case?

20 A. Yes, I have.

21 Q. Okay. Do you understand that the questions  
22 which you give in this deposition to the questions I  
23 ask must be answered completely based not only on  
24 what you know personally but also on knowledge  
25 available to Brown & Williamson?

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1 MR. SCHNEIDER: Objection to the form.

2 A. Yes, to the extent that I have that knowledge,  
3 and I've taken reasonable steps to obtain that  
4 knowledge.

5 Q. All right, we'll talk about that in a bit.

6 Do you understand that if I ask a question with  
7 the word "you" in it, unless I specify otherwise, the  
8 word "you" means both you and Brown & Williamson?

9 A. Yes.

10 Q. Do you understand that the questions that you --  
11 I'm sorry.

12 Do you understand that the answers that you give  
13 to the questions are to be based not only on what you  
14 know personally, but also what you learned in  
15 preparation for this deposition?

16 A. Yes, I do.

17 Q. Is there anyone who is better qualified to  
18 testify regarding the subjects that are listed in  
19 Deposition Exhibit 15?

20 A. I don't believe that there is.

21 Q. From time to time I'm going to be referring to  
22 this lawsuit brought on behalf of the State of  
23 Minnesota and Blue Cross/Blue Shield as "this case."  
24 Can we agree that when we refer to "this case,"  
25 that's what we mean?

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1 A. Yes, we can.

2 Q. Can we also agree that unless my questions ask  
3 for information about document collection and  
4 production in another case, that all of my questions  
5 refer to document collection and production in this  
6 lawsuit, in this case?

7 A. Yes.

8 Q. Okay.

9 (Plaintiffs' Exhibit 16 was marked  
10 for identification.)

11 BY MS. WIVELL:

12 Q. Sir, showing you what's been marked as  
13 Plaintiffs' Exhibit 16, can you identify it for the  
14 record?

15 A. It's identified as Plaintiffs' first set of  
16 requests for production of documents to Brown &  
17 Williamson Tobacco Corporation.

18 Q. Sir, there is a definition of "documents" which  
19 appears on the third page of Exhibit 16, beginning on  
20 the third page; correct?

21 A. Yes, there is.

22 Q. Have you seen that definition of documents  
23 before?

24 A. Yes, I have.

25 Q. When did you see it?

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- 1 A. I saw it in late March.
- 2 Q. Is that the first time you saw it?
- 3 A. Yes, it is.
- 4 Q. You read it at that time?
- 5 A. Yes, I did.
- 6 Q. Did you understand that the word "documents," as
- 7 set forth in plaintiffs' first set of requests for
- 8 production of documents to Brown & Williamson Tobacco
- 9 Corporation, included all of the different kinds of
- 10 things that are listed under the word "document" on
- 11 page three of Exhibit 16?
- 12 A. Yes, I do.
- 13 Q. And is it your understanding that in collecting
- 14 documents responsive to plaintiffs' document requests
- 15 in this case, that Brown & Williamson used this
- 16 definition of documents?
- 17 A. That is my understanding.
- 18 Q. And just so we're clear, when you say --
- 19 When you refer to your understanding, you're
- 20 referring to Brown & Williamson's understanding too;
- 21 correct?
- 22 A. That's correct.
- 23 Q. Sir (coughing) Pardon me.
- 24 I think you said earlier, and correct me if I'm
- 25 wrong, that you are the person most knowledgeable

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1 about the collection of documents responsible for --  
2 I'm sorry -- responsive to requests for production in  
3 this case?

4 MR. SCHNEIDER: Objection.

5 A. I said something similar to that, yes.

6 Q. All right. Well let me ask it again just in  
7 case -- I want to make sure we're all on the same  
8 page.

9 Are you the person most responsible concerning  
10 the collection of documents responsive to specific  
11 requests for production made by the plaintiffs in  
12 this case?

13 A. I am the person -- I'm not --

14 I'm not sure that I agree that I'm the most  
15 responsible person for the collection of the  
16 documents. However, I'm the person who is most  
17 knowledgeable and -- and is best prepared for this  
18 deposition today.

19 Q. All right. Let me ask it a little differently  
20 then. Are you the question most -- or I'm sorry.  
21 Let me start again.

22 Are you the person most knowledgeable about the  
23 collection of documents responsive to the specific  
24 requests for production made by plaintiffs in this  
25 case?

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1 A. Yes, I believe I am.

2 Q. Did you participate in any way in the collection  
3 and production of documents in this case?

4 A. Yes, I did.

5 Q. How did you participate?

6 A. My participation was as a department manager  
7 during the collection of documents throughout the  
8 company in early 1996.

9 Q. Sir, this case was filed, I believe, in August  
10 of 1994. Can you tell me how your participation as a  
11 department manager in 1986 makes you the most  
12 knowledgeable person about the collection of  
13 documents in this case?

14 MR. SCHNEIDER: Objection.

15 A. I can tell you that your question to me was how  
16 was I personally involved. You asked me now how I am  
17 knowledgeable about the collection of documents, and  
18 my response to that is that in my capacity as audit  
19 director I was involved in the collection process  
20 within my departments, audit and risk management, and  
21 had the opportunity to review how it was conducted  
22 at -- at that time. I was also involved at various  
23 stages -- some of my staff have conducted efficiency  
24 reviews and value-for-money reviews --

25 (Discussion off the stenographic record.)

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1 A. -- of the document collection process conducted  
2 by outside counsel. I'm also a member of the records  
3 management steering committee, the audit member. And  
4 more than that, having been nominated as the company  
5 representative for this case, I have prepared myself  
6 to come and appear before you today.

7 Q. All right. Let's put aside how you prepared for  
8 today. We'll be getting to that in a bit.

9 I still don't understand what you did  
10 specifically after this case was filed in mid-1994 to  
11 participate in the collection and production of  
12 documents for this particular case.

13 A. My personal participation.

14 Q. Yes, your personal participation.

15 A. That was --

16 There was a -- a sweep undertaken throughout the  
17 company by our outside counsel, and early in 1996.  
18 The sweep was conducted within my department within  
19 Louisville. Prior to that there had been sweeps  
20 conducted in other parts of the company, but my  
21 personal participation was during February 1996.

22 Q. And what did that personal participation consist  
23 of?

24 A. Consisted initially of a meeting with outside  
25 counsel for me and my staff, my direct reports, where

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1 it was communicated what the background to this --  
2 this was, what the process was going to be. And  
3 subsequent to that meeting, about 10 or 11 lawyers  
4 came back into my department and sat down  
5 individually with everybody and requested information  
6 as to where records were kept in order to identify  
7 records which may be responsive, and those records  
8 were then collected by the outside counsel.

9 Q. All right. Let me see if I have this correct.  
10 What you did to personally participate in the  
11 document production in this case was: Have a meeting  
12 with your direct reports concerning the -- what you  
13 refer to as the sweep process. Is that one thing  
14 that you did?

15 A. That's right. The meeting was with outside  
16 counsel --

17 Q. Okay.

18 A. -- and my direct reports.

19 Q. And then did you have a meeting with one of the  
20 lawyers individually to discuss whether you had any  
21 documents that were responsive?

22 A. That's correct. I believe it was with several  
23 lawyers.

24 Q. Is there anything else that you personally did  
25 as involvement in the collection and production of

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1 documents in this case?

2 A. Certainly as part of our internal audit work on  
3 the document collection process, some of my staff  
4 were involved in reviewing the process, reviewing it  
5 for value-for-money aspects and for security aspects,  
6 reporting to me on that engagement, and I reviewed  
7 their work.

8 Q. What do you mean by "value-for-money audits?"

9 A. Well what we would have done there is looked at  
10 billings received from outside counsel and reviewed  
11 the operation to see whether there were ways to  
12 achieve the objectives more efficiently or for less  
13 cost.

14 Q. Correct me if I'm wrong. So what you're saying  
15 is that you reviewed the work that your staff did to  
16 see whether the outside lawyers that were hired by  
17 Brown & Williamson to take part in the document  
18 production were giving you the best value for your  
19 money?

20 A. Correct.

21 Q. You were looking at the bottom line and whether  
22 you couldn't be getting more for your dollar; right?

23 A. Right.

24 Q. And you also said that you participated by  
25 reviewing work done by your staff concerning security

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1 of these audits. What do you mean by that?

2 MR. SCHNEIDER: Objection.

3 A. The review was looking at security of the  
4 documents while they were being collected.

5 Q. What do you mean by "security of the documents  
6 while they were being collected?"

7 A. Well, we're talking about Brown & Williamson's  
8 official records, and as part of the collection  
9 process, given the substantial amount of records that  
10 were being taken from our offices, transported,  
11 reviewed, copied, et cetera, we just wanted to have  
12 some assurance that security aspects over those  
13 documents were being adequately considered.

14 Q. You didn't want to make sure that people added  
15 to the documents or stole them; right?

16 A. We wanted to make sure that the security was  
17 adequate so the documents were not stolen, correct.

18 Q. Well you also wanted to make sure that things  
19 weren't added, too; didn't you?

20 A. I don't think that the audit specifically looked  
21 at documents being added to the process.

22 Q. You had no reason to believe that documents  
23 might be added to the process?

24 A. Right.

25 Q. You were concerned about security because the

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1 records that were being looked at were important B&W  
2 business assets; correct?

3 A. Information is important to business, yes.

4 Q. And the documents that contain that information  
5 are valuable B&W assets; aren't they?

6 A. Yes.

7 Q. Have we described everything that you did before  
8 getting ready for this deposition today, personally,  
9 concerning the collection and production of documents  
10 in this case?

11 A. We have not described how I prepared myself for  
12 this deposition.

13 Q. And I said we'd get to that in a bit. That's  
14 why I put that aside.

15 But have we just now discussed everything, apart  
16 from your preparation for this deposition, that you  
17 did personally to participate in the collection and  
18 production of documents in this case?

19 A. I believe we have.

20 Q. Who would you consider to be the person most  
21 knowledgeable about the collection and production of  
22 documents in this case, apart from you?

23 A. Since Brown & Williamson requested its outside  
24 counsel to collect these documents and prepare them  
25 for submission in the case, I would characterize our

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1 outside counsel as -- as being in that position.

2 Q. Which of the outside counsel would you put as

3 the most knowledgeable person?

4 A. King & Spalding.

5 Q. That's a law firm; isn't it?

6 A. Right.

7 Q. All right. At King & Spalding, who at King &

8 Spalding is the most knowledgeable person about the

9 collection and production of responsive documents in

10 this case?

11 A. I think that would be Dan Willoughby.

12 Q. And how long has Mr. Willoughby been outside

13 counsel for Brown & Williamson?

14 A. I don't know exactly how long, but I know it's

15 been more than a year at least.

16 Q. All right. Has it been since the mid-'80s?

17 A. I don't know, but I can find out and let you

18 know.

19 Q. Thank you. I'd appreciate it if you'd do that.

20 And what were Mr. Willoughby's responsibilities

21 with regard to the collection of responsive documents

22 in this case?

23 A. Well Mr. Willoughby, I think, coordinated the

24 efforts of King & Spalding and was directly involved

25 in, for example, the initial meeting within my

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1 department.

2 Q. Anything else?

3 A. I think that answered your question.

4 Q. Were there any other law firms that were  
5 involved in the document collection and production in  
6 this case?

7 A. Yes, there were.

8 Q. What other law firms?

9 A. Brown, Todd & Hayburn were also -- were also  
10 involved.

11 Q. And where are they located?

12 A. They're located in Louisville.

13 Q. Any other law firms that were involved in the  
14 collection and production of documents?

15 A. I believe not in this case.

16 Q. Faegre & Benson was not involved in the  
17 collection and production of documents in this case?

18 A. I'm sorry, you -- you're correct, they would  
19 have been involved in the Minnesota -- the final  
20 piece of presenting the documents in the case.

21 Q. What do you mean by "the final piece?"

22 A. My understanding is that the collection process  
23 involved -- once documents had been boxed and  
24 prepared and sent up to Minnesota, they were to first  
25 come through that firm before actually being put into

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1 the -- the depository location.

2 Q. And they --

3 Every single document was reviewed by Faegre &

4 Benson before it was produced to the depository?

5 A. I understand that they undertook a check to make

6 sure that the boxes had documents, that they were

7 correctly characterized, but I don't believe that

8 they looked at every document.

9 Q. And who at Faegre & Benson was responsible for

10 that final piece, as you characterized it?

11 A. I believe Jack Frilbey.

12 Q. You mean Fribley?

13 A. Fribley.

14 Q. Who at Brown, Todd & Hayburn were responsible

15 for the document collection and production?

16 A. I cannot remember --

17 Ernest Clements is -- is an individual who's

18 been most closely associated with it.

19 Q. And it's your understanding --

20 A. It's my understanding that he was responsible.

21 Q. Thank you.

22 If I were to ask you questions about document

23 collection in this case which you couldn't answer,

24 who would you go to to ask for the answers?

25 A. I think that would depend on the nature of your

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1 question.

2 Q. Well does some names or a name or names pop into  
3 mind of people that had enough knowledge that you'd  
4 go to them right off the bat and ask your questions?

5 A. Well I -- I still believe that would depend on  
6 the specific question. It may be somebody within  
7 Brown & Williamson, or it may be somebody in outside  
8 counsel. I can't --

9 Q. Was there someone within Brown & Williamson who  
10 had responsibility for overseeing the production in  
11 this case?

12 A. I think the answer to that is there's no one  
13 person.

14 Q. Well who had the most to do with the production  
15 of documents in this case from inside Brown &  
16 Williamson?

17 A. I would say that from an administrative point of  
18 view, our in-house counsel had a lot to do with  
19 establishing the process and setting that up.

20 Q. And who would that be?

21 A. That would be John Kiser.

22 Q. Was John Kendrick Wells involved in this  
23 production?

24 A. I believe he was.

25 Q. What was his responsibility?

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- 1 A. Well he may have been initially involved at the  
2 beginning. I suspect that John Kiser took over  
3 direct responsibility later on from him.
- 4 Q. John Kiser is in the legal department at B&W?
- 5 A. That's correct.
- 6 Q. And Mr. Wells is in the legal department at  
7 Brown & -- B&W?
- 8 A. That's correct.
- 9 Q. Did you talk to Mr. Willoughby in preparation  
10 for your deposition today?
- 11 A. Yes, I did.
- 12 Q. Did you talk to Ernest Clements in preparation  
13 for your deposition today?
- 14 A. Yes, I did.
- 15 Q. Did you talk to John Kiser in your -- in  
16 preparation for your deposition today?
- 17 A. No, I have not.
- 18 Q. Did you talk to Kendrick Wells in preparation  
19 for your deposition today?
- 20 A. Yes.
- 21 Q. Are there any particular documents that you  
22 could go to that were generated about the collection  
23 of -- and production of documents in this case?
- 24 A. I'm not sure I understand.
- 25 Q. All right. Were there documents generated as

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1 part of the collection and production process?

2 A. I'm sure there were in terms of notes, reports  
3 and so on.

4 Q. Have these been collected somewhere?

5 A. I --

6 Have they been collected somewhere? If records  
7 were prepared, then they would have been retained in  
8 accordance with our --

9 If they were company records, they would have  
10 been retained in accordance with our company record-  
11 retention process.

12 Q. (Coughing) Excuse me.

13 What kind of documents were generated as this  
14 collection went along?

15 A. Are you current --

16 Are you referring to documents relative to  
17 documents in the process?

18 Q. Yes, sir, I am. Thank you.

19 A. I understand that lists were prepared of  
20 locations that had been visited. I understand that  
21 reports were prepared, progress reports prepared by  
22 outside counsel.

23 Q. Any other kind of documents generated?

24 A. I'm personally aware of an internal audit report  
25 or memorandum following our work on the process.

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1 Q. Any other documents that you're aware of?

2 A. I can only speculate that there may be others.

3 Q. Any that you have seen?

4 A. No.

5 Q. Any that have been read to you?

6 A. I have read a number of documents in preparation  
7 for my deposition today.

8 Q. Are there any other kinds of documents that you  
9 read in preparation for your deposition that you  
10 haven't described?

11 A. I don't believe so.

12 Excuse me. I have read the interrogatories and  
13 the responses, for example.

14 Q. But I'm talking about documents that were  
15 generated while Brown & Williamson was trying to  
16 collect responsive documents. Is there anything else  
17 that you can think of that you haven't mentioned?

18 A. No.

19 Q. I want to focus on the decision about whether a  
20 document, once it was determined it was responsive,  
21 should be produced or not. Are you --

22 Did you take part in that process at all?

23 A. I did not take part in the decision process.

24 However, to the extent that when the sweep was  
25 conducted within my area, the outside attorneys

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1 communicated to me the nature of the documents that  
2 were required, they showed me a -- an extract listing  
3 that described the kinds of documents that were  
4 required, and they asked me whether I had any  
5 documents which may be responsive or which may fall  
6 into those categories.

7 Q. What do you mean by "extract listing?"

8 A. I'm referring to a -- a page listing the types  
9 of documents that were required.

10 Q. You were provided with such a -- a page?

11 A. I was shown the page at the time of the  
12 interviews.

13 Q. And what did this page include?

14 MR. SCHNEIDER: I'll object to the question  
15 and I will instruct the witness not to discuss the  
16 content of the document other than the general  
17 description you gave, because we claim work product  
18 with respect to the document.

19 MS. WIVELL: I'm sorry, counsel, I'm asking  
20 for the facts of what was contained in the document.

21 Q. What was --

22 What kinds of documents were included on this  
23 extract listing that you were shown about documents  
24 they were looking for?

25 MR. SCHNEIDER: I will object to the

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1 question and instruct the witness not to answer, not  
2 to describe the contents of what we claim is a  
3 work-product document. You, of course, can ask him  
4 what kind of documents he was asked to collect.

5 MS. WIVELL: Precisely. I'm asking him  
6 what kind of documents this list included.

7 Q. Was it a one-page list?

8 A. I believe it was.

9 Q. A column of types of documents that you were to  
10 look for as potentially responsive in your files;  
11 correct?

12 A. I think potentially responsive generally.

13 Q. And you understand --

14 Did you understand that it was the kind of  
15 documents that are listed on page three of Exhibit  
16 16?

17 A. Yes, I did.

18 Q. Would you look at the list on page three of  
19 Exhibit 16 and tell me if it includes the kinds of  
20 docs -- documents -- I'm sorry. Let me begin again.

21 Would you please look at page three of Exhibit  
22 16 and tell me if the definition section includes  
23 those kinds of documents that you were shown on the  
24 extract listing that you referred to earlier in your  
25 testimony?

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1 A. The extract listing that I was shown preparatory  
2 to the sweep being conducted in my department,  
3 simply -- as I recall, I only saw it at that time in  
4 February 1996 -- it simply listed the -- the -- the  
5 subject areas of the documents that were being  
6 sought. I don't believe it had a full definition of  
7 what a document is.

8 Q. So just so we're clear here, the extract listing  
9 that you're referring to did not include the  
10 definition of documents that appears on page three  
11 and over on to page four of Exhibit 16.

12 MR. SCHNEIDER: I will object to the  
13 question and instruct the witness not to discuss the  
14 content of the document. You can discuss what kind  
15 of documents you were asked to collect, but the  
16 document itself is a work-product document which we  
17 don't believe is discoverable, and I will instruct  
18 you not to discuss those contents.

19 Q. Did the extract listing you're referring to  
20 include the definition of documents that appears on  
21 page three and page four of Exhibit 16?

22 A. I believe it did not. But if I can elaborate, I  
23 believe that the -- the interviews that were  
24 conducted and the meetings that were held were such  
25 that the sweep would have elicited documents in a

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1 broad nature of -- of document as defined in this --  
2 in this set of requests.

3 Q. Now the general subject matter of the extract  
4 listing that you referred to was what again?

5 A. It was a list of categories of -- of subject  
6 matter which was responsive to this case; for  
7 example, smoking and health, nicotine, et cetera.

8 Q. Addiction?

9 A. Alleged addiction, properties of nicotine, and  
10 so on.

11 Q. And those categories that we have just mentioned  
12 were included in that document; right?

13 A. I believe so.

14 Q. Were marketing and advertising documents  
15 included in that document?

16 MR. SCHNEIDER: Objection. I have  
17 instructed you, Mr. Lowther, not to discuss the  
18 contents of the document. You can answer questions  
19 as to what you understood was being collected, but do  
20 not discuss it in terms of the content of the  
21 document. We are making a work-product objection  
22 with respect to that document.

23 MS. WIVELL: Mr. Schneider, I'm going to  
24 object to your violation of the court's order  
25 concerning objections dated 3-20-96. I would

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1 appreciate it if you would not give speaking  
2 objections.

3 MR. SCHNEIDER: I believe that I'm  
4 entitled, Ms. Wivell, to instruct the witness not to  
5 answer, and given the nature of your questions, I  
6 believe I'm entitled to instruct him on that topic,  
7 and have let you hear that instruction.

8 MS. WIVELL: I'm glad to hear that you  
9 agree that you just instructed him how to answer.

10 MR. SCHNEIDER: I do not agree.

11 BY MS. WIVELL:

12 Q. Mr. Lowther -- Lowther, pardon me, are there any  
13 other subjects that you can remember that were listed  
14 on this extract listing?

15 MR. SCHNEIDER: Objection. I instruct you  
16 not to answer.

17 Q. Do you remember -- "yes" or "no" question --  
18 other subjects that are on the extract listing?

19 A. I -- I have a -- a recollection of the broad  
20 nature of the categories that were -- were on this  
21 listing.

22 Q. And what other categories do you recall?

23 MR. SCHNEIDER: Mr. Lowther, I instruct you  
24 not to answer.

25 MS. WIVELL: All right. Let's call the

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1 court. We'll go off the video record, I guess.

2 THE REPORTER: Off the record, please.

3 (Recess taken.)

4 BY MS. WIVELL:

5 Q. I'd like to go back to a topic I had just begun  
6 to discuss before we got on to this last subject, and  
7 we'll put that off until we hear from the judge. I  
8 want -- and that's the decision-making process about  
9 which responsive documents would be produced in this  
10 case and which would not.

11 Were you responsible at all for that process?

12 A. For the decision-making process? No, I was not.

13 Q. Who was?

14 A. It was --

15 My understanding is that -- that the process  
16 would have been collaborative review first prepared  
17 by King & Spalding, then reviewed with our in-house  
18 counsel.

19 Q. Who at King & Spalding was responsible for  
20 the -- the decision-making process about which  
21 documents would be and which documents would not be  
22 produced?

23 A. I'm sorry. Are you referring to a  
24 document-by-document decision-making process, or are  
25 you talking about the process that we -- overall was

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1 designed in order to collect all the documents as a  
2 group?

3 Q. A document-by-document. Who was responsible for  
4 that process?

5 A. Let -- let me describe the process to you.

6 I'm -- I -- I told you earlier that each department  
7 within the company was visited. Documents were  
8 collected based on interviews with company employees  
9 as to where the documents were, the kinds of  
10 documents that were being requested. And they were  
11 then taken away, collected and transferred to King &  
12 Spalding's premises where they were reviewed by  
13 attorneys to determine whether they were responsive  
14 or not.

15 My understanding then is that after that review,  
16 there was a second review by another attorney for  
17 quality control purposes, again to determine whether  
18 the document was responsive or not. If documents  
19 were identified as responsive, they were then  
20 collected up and transferred in and ultimately went  
21 into the -- into the depository.

22 Q. All right. Let's take it one step at a time.

23 Who at King & Spalding was responsible for --  
24 overall for the decision of what was and what was not  
25 responsive?

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1 A. On a document-by-document basis, there were a  
2 large number of individual attorneys looking at the  
3 documents. This was a major effort. A huge number  
4 of documents were produced. No single person could  
5 have undertaken the job.

6 Q. All right. Understanding that, there was  
7 someone who was responsible for the conduct of those  
8 many attorneys; correct?

9 A. Yes.

10 Q. Who was that?

11 A. Overall, I would characterize Dan Willoughby as  
12 being overall responsible.

13 And if I may respond to an earlier question  
14 about how long Mr. Willoughby had been involved in  
15 the Brown & Williamson account, I believe it was in  
16 1986 that he first started.

17 Q. Thank you.

18 Where did you learn that information?

19 A. I learned it from counsel.

20 Q. During our break.

21 A. Correct.

22 Q. Let's talk about the second level of review for  
23 responsiveness. Who did that?

24 A. Attorney -- an attorney would have --

25 On a document-by-document basis, the quality

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1 control was undertaken by an attorney. There were a  
2 number of attorneys involved.

3 Q. And who was responsible overall for those  
4 attorneys' decisions?

5 A. For the general approach I would characterize  
6 the responsibility as being a shared one between King  
7 & Spalding and our in-house counsel.

8 Q. Who at King & Spalding?

9 A. Mr. Dan Willoughby.

10 Q. And who in-house?

11 A. Mr. John Kiser.

12 Q. Anyone else?

13 A. Perhaps Mr. Kendrick Wells.

14 Q. "Perhaps." You said "perhaps." Do you know  
15 that for a fact?

16 A. I would -- I would say that --

17 We have a number of in-house attorneys, and  
18 responsibilities over time are changed and adjusted  
19 depending on work load. I believe that both Mr.  
20 Wells and Mr. Kiser have been involved in this --  
21 this process.

22 Q. And by "this process," you're talking about the  
23 document production in this case; right?

24 A. Yes.

25 Q. Anyone else in-house?

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1 A. Well Mr. Burke is -- Mr. Tony Burke is our  
2 general counsel who oversees our in-house attorneys.

3 Q. And what was --

4 A. So he has ultimate responsibility.

5 Q. Was Mr. Burke involved in the document  
6 production? Other than having general responsibility  
7 as general counsel, did he have specific  
8 responsibility?

9 A. As a department head, he would have -- there  
10 would have been a review of any records within his  
11 department. He would have had those  
12 responsibilities. And as our general counsel, he's  
13 overall responsible for our legal operations.

14 Q. Just so we're clear here, are you saying that  
15 the files of the legal department at Brown &  
16 Williamson were reviewed for responsive documents?

17 A. Yes, I am.

18 Q. Okay. And Mr. Burke was responsible for that  
19 review?

20 A. Mr. Burke is in charge, just as I was for the  
21 audit department, Mr. Burke was in charge of the law  
22 department, and the process involved him in the same  
23 way that it involved me.

24 Q. Well let me ask you this: If documents in your  
25 audit department were found to be responsive and were

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1 not produced nor put on a privilege log, would it be  
2 your responsibility ultimately for that mistake, or  
3 would it be the responsibility of the lawyer who  
4 reviewed the file of the person where those documents  
5 were found?

6 A. I can't speculate as to whose responsibility.  
7 It would be -- it would be a mistake, and one would  
8 have to look at the specific circumstances.

9 Q. And how would one look at the -- the specific  
10 circumstances? Are there records of who reviewed  
11 particular files?

12 A. I believe there are.

13 Q. What kind of records are there?

14 A. I believe there's a listing that King & Spalding  
15 has which identifies who assisted, when they were  
16 visited, what department they were in.

17 Q. And does that list also include who did the file  
18 review?

19 A. I'm not certain as to that.

20 Q. Let me ask you this: As part of this process  
21 for production of documents in this case, was it a  
22 requirement that the person who visited your  
23 department and reviewed your files write the report  
24 and then sign it?

25 A. I'm not aware of -- of -- of a report. Which

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1 report are you referring to?

2 Q. Well, if someone came to your audit department,  
3 reviewed your files and talked to your people, was  
4 there a report made of that meeting and that review?

5 A. A listing was made that characterized the time  
6 of the review, who was reviewed, and as well as those  
7 documents that were taken away and collected as -- as  
8 part of the process.

9 Q. Well is there a list of who took away these  
10 important business records?

11 A. As I said earlier, I'm not sure whether the  
12 attorney that was involved in each sweep was recorded  
13 on this list.

14 Q. Did you get a receipt for the records that you  
15 sent that were responsive?

16 A. No, I did not.

17 Q. Did anyone give you any kind of a record about  
18 who was taking away these important business assets?

19 A. I personally was aware of who was taking the  
20 records from my area.

21 Q. But to your knowledge, as the spokesperson for  
22 Brown & Williamson, there is no record of who  
23 reviewed your files.

24 MR. SCHNEIDER: Objection.

25 Q. Is that your testimony?

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1 MR. SCHNEIDER: Objection.

2 A. I am --

3 I cannot recall whether the listing that I  
4 characterized earlier has a reference to the specific  
5 attorney that did the sweep in each department.

6 Q. Did you see these listings in preparation for  
7 your deposition today?

8 A. Yes.

9 Q. What do you recall -- I'm sorry. Let me start  
10 again.

11 What was on those listings?

12 MR. SCHNEIDER: Objection, instruct the  
13 witness not to answer.

14 MS. WIVELL: On what grounds?

15 MR. SCHNEIDER: On the grounds that the  
16 document was prepared for litigation and is work  
17 product.

18 BY MS. WIVELL:

19 Q. Would seeing the documents again refresh your  
20 recollection about what -- whether or not they  
21 contained the name of the attorney who reviewed the  
22 files?

23 A. I'm sure it would.

24 Q. And would seeing them again refresh your  
25 recollection about whether or not this document

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1 contains the name of the person who took away these  
2 important business assets?

3 A. I'm sure it would.

4 MS. WIVELL: Then I request Brown &  
5 Williamson either produce a witness who can answer my  
6 questions, or refresh the witness's recollection so  
7 he can answer my question.

8 BY MS. WIVELL:

9 Q. Is there any other way that you can tell -- let  
10 me start again.

11 Is there any other way that a person who is  
12 unfamiliar with the process could learn which  
13 particular attorney interviewed a particular  
14 employee?

15 A. Let me describe the process. Maybe this will  
16 help. Within my department, the attorney sat down  
17 with each individual and went through their records,  
18 having identified the categories of records that were  
19 expected to be responsive. They then collected those  
20 documents and took them away. So each individual  
21 employee knew which attorneys had been involved at  
22 the time. Documents were returned within a short  
23 space of time to the departments and refiled  
24 within -- within the records, and my recollection is  
25 that there may have been a sheet inserted into the

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1 record that showed that something had been extracted.  
2 Q. What did that sheet say?  
3 A. I believe it just indicated that a record had  
4 been extracted.  
5 Q. Does it say who took it?  
6 A. I don't recall that it said that.  
7 Q. So as you sit here today as Brown & Williamson's  
8 spokesman, you can't direct us to any documents that  
9 would tell us what attorney took what files; correct?  
10 A. I believe you've asked whether I can get back to  
11 you on that.  
12 Q. You've agreed to do that?  
13 A. I will try to do that.  
14 Q. Thank you.  
15 Who are you going to ask that question of?  
16 A. Outside counsel.  
17 Q. Who particularly?  
18 A. Mr. Richard Schneider.  
19 Q. Of King & Spalding?  
20 A. Yes.  
21 Q. Let's talk about the preparation for this  
22 deposition today. I think you said you first saw  
23 Exhibit 15 at the end of March; is that right?  
24 A. I believe so.  
25 Q. What were the circumstances that you saw it?

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1 A. In preparation for this deposition I was sent a  
2 notebook which included Exhibit 15.

3 I beg your pardon. Please let me retract that.  
4 Exhibit 15 I believe I saw -- I believe I saw that on  
5 Tuesday or Wednesday this week for the first time.

6 Q. Did you originally see the first notice of  
7 taking deposition at the end of March?

8 A. I don't believe I did.

9 Q. I'm a little confused. I thought you said  
10 earlier you saw the notice of taking deposition in  
11 March. Am I wrong about that?

12 A. I have -- I have advised you that I've seen the  
13 amended notice of taking deposition this week for the  
14 first time. I do not recall seeing the first notice,  
15 although I may have, at the end of March.

16 Q. All right. Well let's get past that.

17 When you first heard about this deposition, how  
18 did you hear about it?

19 A. I received a phone call from outside counsel.

20 Q. From whom?

21 A. From Mr. Schneider.

22 Q. When was that?

23 A. It was late March.

24 Q. Mr. Schneider is the same Mr. Schneider who is  
25 sitting next to you today?

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- 1 A. That's correct.
- 2 Q. What did you do to get ready for this
- 3 deposition?
- 4 A. I received a notebook containing the
- 5 interrogatories and responses, which I reviewed.
- 6 Q. Anything else?
- 7 A. I met with outside counsel over a period of some
- 8 four days --
- 9 Q. Anything else?
- 10 A. -- to prepare myself for this case.
- 11 I discussed it also with our in-house counsel.
- 12 Q. Which is who?
- 13 A. Mr. Wells.
- 14 Q. Anything else that you did?
- 15 A. Not that I can recall.
- 16 Q. Did you interview anyone?
- 17 A. I interviewed and held meetings with outside
- 18 counsel.
- 19 Q. Apart from outside counsel, who did you
- 20 interview?
- 21 A. I think -- I believe we -- we made some
- 22 telephone calls to pursue different matters.
- 23 Q. Who did you call?
- 24 A. In-house counsel.
- 25 Q. Anyone else?

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1 A. I can't recall anybody else.

2 Q. You said you made phone calls. Were there  
3 multiple calls to in-house counsel?

4 A. There were several calls, yes.

5 Q. All to Mr. Wells?

6 MR. SCHNEIDER: Objection.

7 A. Not all to Mr. Wells. I believe we made calls  
8 to other individuals too, other -- other attorneys.

9 Q. Who did you call?

10 A. We called people -- names I can remember: Mitch  
11 Newhausen, Ernest Clements.

12 Q. Anyone else?

13 A. Not that I can recall.

14 Q. Who did you meet with for these four days, the  
15 outside counsel?

16 A. I met with Mr. Schneider of King & Spalding, Ms.  
17 Fox from Kirkland & Ellis, Ms. Warner from King &  
18 Spalding, Mr. Fribley from a Minnesota law firm whose  
19 name escapes me, Mr. Willoughby from King & Spalding.

20 Q. Anyone else?

21 A. Mr. Kendrick Wells from Brown & Williamson.

22 Q. What else did you do to get ready for this  
23 deposition?

24 A. I also relied on my past experience within the  
25 company, my knowledge of document records and --

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1           And there was, in addition, a meeting of the  
2 records management steering committee at which my  
3 involvement was briefly discussed.

4 Q.   Who's on the records management steering  
5 committee?

6 A.   Chairman of the committee is Mr. McGraw from  
7 Brown & Williamson, other members are John Kiser,  
8 Henry Frick, George Glassner, Nancy Sturgeon, myself,  
9 and Michele McGlossen, I believe her name is.

10 Q.   Are all of these individuals Brown & Williamson  
11 employees?

12 A.   No. Michele McGlossen works for Pitney Bowes.

13 Q.   Apart from her, are all the rest of these people  
14 Brown & Williamson employees?

15 A.   Yes, they are.

16 Q.   How much time did you spend in preparation for  
17 this deposition?

18 A.   Directly preparing for this, I spent about a day  
19 reading documents and four days with outside counsel  
20 in preparation.

21 Q.   So would it be fair to say that getting ready to  
22 be Brown & Williamson's spokesperson here today, you  
23 spent about 40 hours total?

24 A.   That wouldn't be far wrong.

25 Q.   When did you start getting ready for this depo?

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1 A. Towards the end of March.

2 Q. Would you break down the time that you spent  
3 during the four days that you talked with the  
4 attorneys, tell us how you spent it?

5 A. I spent two days in Louisville meeting with  
6 outside counsel, reviewing the overall process and  
7 the documents that had been provided to me in  
8 advance, and then two days here in Washington.

9 Q. When you say "the documents that you were  
10 provided in advance," you mentioned a notebook that  
11 contained the interrogatory answers and the requests  
12 for documents; is that right?

13 A. Yes.

14 Q. Were there any other documents you were  
15 provided?

16 A. While I was in Louisville there was some -- I  
17 was shown some extracts summarizing numbers of  
18 documents collected.

19 Q. Who showed you those?

20 A. Mr. Schneider.

21 Q. Anything else you were shown?

22 A. I was shown some additional papers that were not  
23 part of the notebooks that had been prepared. I  
24 think perhaps they were papers that ought to have  
25 been included but had been overlooked.

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1 Q. What were those papers?

2 A. One I can recollect is an attachment to a  
3 notification that was sent out to Brown &  
4 Williamson's staff to communicate to them the need to  
5 preserve documents.

6 Q. Who wrote that?

7 A. David Grass.

8 Q. Grass?

9 A. Right, G-r-double-a-s.

10 Q. Is he a Brown & Williamson employee?

11 A. He was a Brown & Williamson employee. I'm not  
12 certain whether he still is a Brown & Williamson  
13 employee.

14 Q. What was the nature of the subject matter of  
15 that document?

16 A. It was a notice to heads of departments within  
17 Brown & Williamson renotifying them of the need to  
18 preserve documents.

19 Q. Dated when?

20 A. Dated September or October, I believe it's '94.  
21 September '94 I believe.

22 Q. What did it say?

23 A. It said --

24 It was a notice to all heads of departments  
25 reminding them of their responsibilities to preserve

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1 documents which were required to be held for legal  
2 reasons.

3 Q. Did it say anything else?

4 A. That was the intent of the document.

5 Q. What other documents were you shown as part of  
6 your preparation for this deposition?

7 A. I can't recall any specific other documents.

8 Q. Would it refresh your recollection to see those  
9 documents again?

10 A. Naturally.

11 Q. Would you take a look at those documents again  
12 so that we can come back and you can answer my  
13 questions about them?

14 A. I will do that.

15 Q. Thank you.

16 You referred a little bit ago to notebooks, in  
17 the plural, which had been prepared. You've  
18 mentioned one. Were there other notebooks?

19 A. I was given one notebook.

20 Q. Is there anything else in it that was -- I'm  
21 sorry.

22 Is there anything else other than the  
23 interrogatories and requests for productions that  
24 were in that notebook?

25 A. I believe not.

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1 Q. In addition to the documents that we have talked  
2 about, the documents you're going to go back and look  
3 at, is there anything else that you looked at in  
4 preparation for your deposition?

5 A. May I correct my earlier response? I believe  
6 there was a Case Management Order within the -- the  
7 document book which may not be classified as an  
8 interrogatory and a response.

9 Q. All right. Apart from those documents, is there  
10 anything else that you looked at in preparation for  
11 your deposition today?

12 A. No.

13 Q. Correct me if I'm wrong. I think you said  
14 earlier in the deposition you looked at some of the  
15 lists -- I think you referred to them as the subject  
16 we called the special -- no. Well I'll come back to  
17 that.

18 Is there anything else that you did in  
19 preparation for your deposition today?

20 A. Well I think I've -- I've answered various  
21 stages. I've relied on my knowledge of the company  
22 operations in the past, I have been involved in  
23 internal audits which have reviewed the process, I've  
24 participated in meetings of the record management  
25 committee, and I have also prepared myself for this

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1 deposition. I believe that characterizes my  
2 preparation.

3 Q. Was anything read to you in preparation for your  
4 deposition other than the -- I'm -- let me start  
5 again.

6 Was anything read to you in preparation for your  
7 deposition?

8 A. Yes.

9 Q. What was read to you?

10 A. Extracts of some of the documents that I had  
11 already reviewed.

12 Q. Anything else?

13 A. Correspondence between plaintiffs' counsel and  
14 defendants' counsel.

15 Q. Anything else?

16 A. Not that I can recollect.

17 Q. Did you review any instructions which are given  
18 to people who were supposed to collect responsive  
19 documents?

20 A. I reviewed them when the sweep was undertaken  
21 within my department.

22 Q. Did you review them while you were preparing for  
23 this deposition?

24 A. No, I did not.

25 Q. What instructions were given to people who were

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1 supposed to collect responsive documents for this  
2 case?

3 A. Prior to attorneys being associated with the  
4 Brown & Williamson sweep, I understand they were  
5 given training on the requirements of the Minnesota  
6 case.

7 Q. I'm not sure you answered --

8 Were you done with your answer?

9 A. Yes.

10 Q. I'm not sure you answered my question. What  
11 instructions are you aware of, specific instructions  
12 are you aware of?

13 A. Outside attorneys were instructed to collect  
14 documents which were responsive to the Minnesota  
15 case. They were instructed to collect the documents  
16 and to broadly interpret the nature of whether the  
17 document was responsive or not, and to err on the  
18 side of collecting the document if they were  
19 uncertain.

20 Q. So I'm clear here, are you saying that the  
21 people who did the first sweep through the company,  
22 what I think you referred to as the initial step  
23 earlier, were told to broadly interpret what was  
24 responsive; correct?

25 A. I believe that's correct.

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1 Q. Based on the list that we were discussing  
2 earlier in the deposition.

3 A. My understanding is that the list was prepared  
4 for the purposes of communicating to Brown &  
5 Williamson employees the nature of the documents that  
6 were required, and that there was training given to  
7 the attorneys, the lawyers, that were associated with  
8 the sweep.

9 Q. And that's the extract list that we were talking  
10 about earlier; correct?

11 A. First item is the extract list we were talking  
12 about earlier.

13 Q. The first item? Were there more items?

14 A. I mentioned the list and the training. Training  
15 was the second item.

16 Q. Were there written instructions that went with  
17 the training?

18 A. I understand that the attorneys would have  
19 reviewed the requirements of the case based on the  
20 interrogatories.

21 Q. I'm not sure that that answers my question.  
22 Were there written instructions given to the  
23 people who went out and made that first-level sweep  
24 for responsive documents?

25 A. I don't know.

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1 Q. Would you find out, please, and get me back to  
2 me on that?

3 A. I'll do that.

4 Q. When you met with the attorneys and spent this  
5 four days with them, what facts did you learn  
6 concerning the document production and collection in  
7 this case?

8 A. I learned facts relating to where the documents  
9 were collected from, I learned facts relating to the  
10 process that was adopted to collect these documents,  
11 I learned facts relating to the overall control of  
12 the document, I learned facts relating to the number  
13 of documents that were collected.

14 Q. Anything else?

15 A. You've asked a very broad question. Perhaps  
16 you'd like to narrow it down for me to help me.

17 Q. Well I'm just trying to find out the nature of  
18 the facts that were communicated to you during  
19 your --

20 It was an educational process for you; wasn't  
21 it?

22 A. Yes, it was.

23 Q. And these are all areas that you had no  
24 knowledge of before you had this meeting with Brown &  
25 Williamson's lawyers; right?

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1 A. No, that's not right. I had some earlier  
2 indication of the process because of, A, my personal  
3 involvement, B, internal audits which were undertaken  
4 to look at the process, C, my general knowledge and  
5 awareness of what was going on in the company.

6 Q. Fair enough.

7 So it would be fair to say that you didn't have  
8 the big picture of what was happening at Brown &  
9 Williamson until you got ready to go into this  
10 deposition, but you did have knowledge of what was  
11 happening in your own department; right?

12 A. I had knowledge of what was going on across the  
13 company, not just within my own department.

14 Q. Okay.

15 A. Because of the audits, because of the fact of  
16 my -- my job duties.

17 Q. Now you understand -- and when I say "you,"  
18 again I'm referring to both you and Brown &  
19 Williamson -- that the plaintiffs in this case are  
20 the State of Minnesota and Blue Cross/Blue Shield of  
21 Minnesota; right?

22 A. Yes, I do.

23 Q. And you know that the plaintiffs served requests  
24 for production of documents on B&W asking various  
25 categories of documents from its files be produced so

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1 plaintiffs could see them; right?

2 A. Yes, I do.

3 Q. And the list that we were talking about earlier,  
4 the extract list that you're referring to, is the  
5 list of documents which Brown & Williamson employees  
6 were asked -- general categories of documents that  
7 Brown & Williamson employees were asked to look for  
8 as part of that document production; correct?

9 A. Yes.

10 Q. And you cannot tell us from your memory the  
11 complete list of those documents; can you?

12 A. No.

13 Q. You have given us some of the kinds of documents  
14 or categories of documents which are on that list;  
15 correct?

16 A. I believe I did.

17 Q. And you have memory of more of the categories of  
18 documents that are on that list; correct?

19 A. Yes.

20 Q. But if I were to ask you to name every single  
21 category, you would need the list in order to refresh  
22 your recollection; wouldn't you?

23 A. Yes.

24 Q. And in order for us to know whether that list  
25 was complete, we would have to see that list;

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1 wouldn't we?

2 A. Yes.

3 Q. Now you understand that plaintiffs' requests to  
4 produce documents are a part of the lawsuit that's  
5 called "discovery;" right?

6 A. Yes.

7 Q. And you've reviewed plaintiffs' requests for  
8 production and interrogatories in this case?

9 A. Yes, I have.

10 Q. And you know that they ask for production of  
11 documents relating to these various topics, including  
12 smoking and health, addiction, marketing and  
13 advertising, so forth; right?

14 A. Yes, I do.

15 Q. Now did Brown & Williamson understand -- strike  
16 that.

17 Brown & Williamson understood it had a legal  
18 obligation to make a good-faith search for its files  
19 for responsive documents; right?

20 A. It understood that, and it did so.

21 Q. And Brown & Williamson understood it had a legal  
22 obligation to produce those non-privileged documents  
23 on a privilege log -- I'm sorry. I said that wrong.  
24 Let me start again.

25 Brown & Williamson understood that it had an

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1 obligation to produce a privilege log that listed  
2 attorney-client and work-product privileges for all  
3 responsive documents it withheld from production;  
4 correct?

5 A. I understand that's correct.

6 Q. Has Brown & Williamson done so?

7 A. I understand that our outside counsel is in the  
8 process of preparing a log, privilege log.

9 Q. This deposition is being taken on April 10th,  
10 1997; correct?

11 A. Yes, it is.

12 Q. So it's your testimony on behalf of Brown &  
13 Williamson that Brown & Williamson has not at this  
14 time provided a complete log of all documents which  
15 it has withheld from discovery which are responsive;  
16 correct?

17 A. That's correct. I understand that the process  
18 of preparing that log is under way and that every  
19 effort is being given to produce it as soon as  
20 possible.

21 Q. But it's not done as we sit here today; is it?

22 A. That's right.

23 Q. Now did Brown & Williamson understand that, by  
24 court order in this case, all responsive documents  
25 were to have been produced no later than January 1st,

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1 1997?

2 A. My understanding was that Brown & Williamson was  
3 to produce all documents identified as responsive by  
4 31 December 1996.

5 Q. Fair enough.

6 So by the first of this year, 1997, Brown &  
7 Williamson was to have produced all responsive  
8 documents; correct?

9 A. That's correct.

10 Q. Did it do so?

11 A. My understanding is that Brown & Williamson,  
12 through its outside counsel, has provided all  
13 documents identified as responsive by the end of  
14 1996, but there may be additional documents which are  
15 responsive which will be still provided because  
16 there's a process of review of documents which were  
17 initially identified as privileged which may not be  
18 privileged when they're reviewed and the log is  
19 produced.

20 Q. So the answer to my question, sir, is no, Brown  
21 & Williamson did not produce all responsive documents  
22 by January 1st, 1997; did it?

23 A. I believe that we have produced all documents  
24 identified as responsive, that's a huge number of  
25 documents, and there's still the possibility that

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1 there may be additional documents subsequently  
2 identified as responsive and not privileged which may  
3 be still produced as part of the process of preparing  
4 the privilege log and reviewing documents which were  
5 initially characterized as privileged.

6 Q. Sir, isn't it a fact that documents were  
7 produced last Friday in the State of Minnesota  
8 litigation?

9 A. I understand that to be the case.

10 Q. Those were responsive documents; correct?

11 A. Yes, they were. They were produced.

12 Q. And they were responsive documents which had not  
13 previously been produced; correct?

14 A. Right.

15 Q. They were responsive documents which previously  
16 had not been placed on a Brown & Williamson privilege  
17 log?

18 A. I -- I think you're right.

19 Q. You know I'm right; don't you?

20 A. Perhaps you'd like to -- to share me -- share  
21 with me the documents that you're referring to.

22 Q. Sir, you know I am correct; don't you?

23 A. I believe you are.

24 Q. And it is correct that Brown & Williamson still  
25 has not produced the document entitled "Cigarette

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1 Smoke Inhalation Studies in In-bred Serian Golden  
2 Hamsters;" correct?

3 A. I'm not sure about that one.

4 Q. It would seem to be a responsive document;  
5 wouldn't it?

6 MR. SCHNEIDER: Objection.

7 A. I don't know whether that's a responsive  
8 document or not.

9 Q. You keep in mind you're testifying here on  
10 behalf of Brown & Williamson.

11 You have reviewed the requests for production,  
12 the definition of document, and you're telling me  
13 that you don't know that a document entitled  
14 "Cigarette Smoke Inhalation Studies in In-bred  
15 Serian Golden Hamsters," whether or not that's a  
16 responsive document?

17 A. I would say that it's not possible to determine  
18 whether a document is responsive from a review of its  
19 title alone.

20 Q. How about a document entitled "SH Rule Activity  
21 of Cigarette Smoke and Its Correlation with  
22 Carcinogenic Effects on Hamster and Lung Cultures,"  
23 has that document been produced yet?

24 A. I don't know the answer to that.

25 Q. You could check, though; couldn't you?

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1 A. I could check.

2 Q. Would you do that for me?

3 A. I'll do that.

4 Q. Would you check to see whether that document and  
5 the one we just referred to are listed on any  
6 privilege log that's been produced by Brown &  
7 Williamson in this litigation?

8 A. I'll follow up for you.

9 Q. Thank you.

10 Do you know whether a document entitled  
11 "Cigarette Smoke Condensate Preparation and Dermal  
12 Application to Mice Final Report," dated 3-28-73, has  
13 been produced?

14 A. I'm not prepared to -- to tell you whether it  
15 has been produced or not, but I will follow that up.

16 But --

17 Q. Does it sound like a responsive document to you?

18 A. It may be.

19 Q. May be.

20 You would expect it would have either been  
21 produced or put on a privilege log if Brown &  
22 Williamson were following the court's orders;  
23 correct?

24 A. I would --

25 MR. SCHNEIDER: Objection.

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- 1 A. I would not be able to make a determination.
- 2 Q. Seems to relate to smoking and health; doesn't
- 3 it, sir?
- 4 A. Yes, it does.
- 5 Q. And to be a responsive document, one that should
- 6 have been reviewed to determine whether or not it was
- 7 responsive to document requests in the Minnesota
- 8 litigation?
- 9 A. Yes, you could speculate that.
- 10 Q. Well you have to do more than speculate;
- 11 correct? With a title "Cigarette Smoke Condensate
- 12 Preparation and Dermal Application to Mice Final
- 13 Report," you think that might have something to do
- 14 with smoking and health issues?
- 15 A. Yes.
- 16 Q. You would expect that it would be produced or
- 17 put on a privilege log; wouldn't you?
- 18 A. It --
- 19 I believe that you would have to look at the
- 20 document to determine whether it was responsive or
- 21 not.
- 22 Q. Okay. But at least from the title you could
- 23 make a good argument; right?
- 24 A. You could make an assumption based on the title,
- 25 yes.

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1 Q. And if Brown & Williamson did not put these  
2 documents on a privilege log or produce them, that  
3 would be a violation of its obligation in this  
4 litigation; wouldn't it, sir?

5 MR. SCHNEIDER: Objection.

6 A. If the case --

7 If the document were responsive, yes, it would  
8 be.

9 Q. How about a document entitled "Chronological  
10 Highlights of Smoking and Health Events, Brown &  
11 Williamson Research," does that sound like it would  
12 be a responsive document?

13 A. Could you repeat the title, please?

14 Q. "Chronologic -- Chronology Highlights of Smoking  
15 and Health Events, Brown & Williamson Research."

16 MR. SCHNEIDER: Objection.

17 A. It may be responsive.

18 Q. If it discusses projects that relate to -- I'm  
19 sorry.

20 If it discusses projects that were done by Brown  
21 & Williamson and B.A.T. on smoking-and-health-related  
22 issues, does that sound like a responsive document?

23 A. It may be.

24 Q. You would expect it to either then appear on a  
25 privilege log or have been produced; right?

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1 A. If --

2 MR. SCHNEIDER: Objection.

3 A. If it were indeed responsive.

4 Q. Ah. Could you tell me what definition of  
5 "responsive" would exclude a document that involves  
6 highlights of smoking and health events and Brown &  
7 Williamson Research?

8 MR. SCHNEIDER: Objection.

9 A. I -- I clearly am not able to, on a  
10 document-by-document basis, make a determination as  
11 to whether a document is responsive or not.

12 Q. I'm sorry, sir. What definition of "responsive"  
13 was used by Brown & Williamson in making  
14 determinations in this production?

15 A. The definitions were in accordance with the Case  
16 Management Order. And the process, as I've  
17 characterized it earlier, was for outside counsel to  
18 review documents on a document-by-document basis to  
19 determine whether they were responsive or not. The  
20 instructions given to the attorneys were to -- to err  
21 on the side of producing documents if they were -- if  
22 there were any doubt.

23 Q. Ah. All right. Well let's say -- assume for  
24 the sake of argument that a document entitled  
25 "Chronology Highlights of Smoking and Health Events,

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1 Brown & Williamson Research," was not produced and  
2 was not put on a privilege log. How would you go  
3 back and determine who made the decision whether or  
4 not this document, which you said might be  
5 responsive, was left off?

6 A. I would ask outside counsel to review this again  
7 and to make a determination. And if it was indeed  
8 found to be responsive, it would be produced.

9 Q. And how would we find out who made the mistake?

10 A. I can't answer that question. I don't know.

11 Q. All right. Would you find out for me and get  
12 back to us on that question?

13 A. Yes.

14 Q. Will you also find out whether this document,  
15 "Chronology Highlights of Smoking and Health Events,  
16 Brown & Williamson Research," has been produced or  
17 put on a privilege log that's been sent to plaintiffs  
18 so far?

19 A. Yes, I will.

20 MR. SCHNEIDER: Should we take a break in a  
21 few minutes?

22 MS. WIVELL: That's fine. I'd like to  
23 finish this up.

24 Q. How about a document entitled "Chronology of  
25 Brown & Williamson Smoking and Health Research," does

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1 that sound like a responsive document to you, sir?

2 A. It may well be.

3 Q. If it were in your files, would you have

4 recommended that it be produced as a responsive

5 document in this case?

6 MR. SCHNEIDER: Objection.

7 A. I would have offered it to the attorneys while

8 they were doing the sweep.

9 Q. And since you had no determination of whether or

10 not a document was produced, it would have been up to

11 the attorneys to determine whether this document

12 should have been produced or not.

13 A. That's correct.

14 Q. Will you find out whether the document,

15 "Chronology of Brown & Williamson Smoking and Health

16 Research," has been produced or listed on a privilege

17 log for us and report back?

18 A. Yes, I will.

19 Q. How about a document concerning "Chemosol

20 Chronology" a file folder, "Cigarette and Tobacco

21 Smoking Effects Research," do you think that might be

22 a responsive document, sir?

23 A. It may be.

24 Q. Sounds like it would be a responsive document;

25 correct?

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1 A. As I said, without looking at the document, it  
2 would be hard to make a determination.

3 Q. Do you know whether this document has been  
4 produced?

5 A. I don't know.

6 Q. If it were responsive, it should have been  
7 listed on a privilege log or produced by this time;  
8 correct?

9 MR. SCHNEIDER: Objection.

10 A. That's correct. If it would have been  
11 identified as responsive, it would have been  
12 produced.

13 MS. WIVELL: Why don't we take a break.

14 THE REPORTER: Off the record, please.

15 (Recess taken.)

16 (Plaintiffs' Exhibit 17 was marked  
17 for identification.)

18 (The following is a teleconference of a  
19 conversation among Ms. Patricia Miller  
20 and counsel present.)

21 MS. WIVELL: Ms. Miller.

22 MS. MILLER: Yes.

23 MS. WIVELL: Defense counsel and I are both  
24 here, and the issue involves a series of questions  
25 which the court reporter can read back to you which

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1 resulted in an instruction not to answer.

2 MS. MILLER: All right.

3 (Record read by the court reporter.)

4 MS. MILLER: Okay. Counsel, as I  
5 understand it, the question is whether the witness  
6 must answer as to the contents of the listing, the  
7 extract listing of the sorts of documents to be  
8 produced?

9 MR. SCHNEIDER: Yes, ma'am.

10 MS. WIVELL: Yes.

11 MR. SCHNEIDER: This is Richard Schneider,  
12 Ms. Miller.

13 MS. MILLER: Yes.

14 MR. SCHNEIDER: This set of questions  
15 relates to a document prepared by counsel in the  
16 litigation for the litigation as a -- as its summary  
17 of the kinds of documents it was trying to gather in  
18 connection with responding to the discovery  
19 requests. We believe that the document, which was  
20 prepared for the litigation, is a work-product  
21 document. Certainly the witness can talk about the  
22 kinds of documents he was asked to collect, he can  
23 talk about the documents that he offered to provide  
24 and the kind of documents the company asked for, but  
25 this document itself, which we refer to as a -- as a

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1 scope statement, our lawyer's summary of what it is  
2 that we were looking for, we believe is a document  
3 prepared for the litigation and therefore work  
4 product and not discoverable, and there should not be  
5 questions about its content.

6 MS. WIVELL: Ms. Miller.

7 MS. MILLER: Yes.

8 MS. WIVELL: The witness has additionally  
9 set -- has additionally answered my initial questions  
10 about some of the kinds of documents that they were  
11 looking for. For example, he told me smoking and  
12 health, addiction-related, marketing and  
13 advertising. He was then instructed not to answer  
14 any more questions. He does know more kinds of  
15 documents that were included in this list, but has  
16 testified he has seen the list but cannot remember  
17 its entire contents and would need the document to  
18 refresh his recollection about all of the different  
19 kinds of documents that were produced in this -- that  
20 they were asking be produced in this case.

21 MS. MILLER: Okay. All right. And the  
22 witness is the document custodian, I take it, for --

23 MR. SCHNEIDER: The witness, Ms. Miller, is  
24 Richard Lowther, who's been designated by the company  
25 to testify as to matters known or reasonably

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1 available to the company about the collection and  
2 production of documents in the Minnesota case.

3 MS. MILLER: For which defendant, sir?

4 MR. SCHNEIDER: Brown & Williamson Tobacco  
5 Corporation.

6 MS. MILLER: Brown & Williamson. Okay. I  
7 believe I have enough information to relate to the  
8 judge. He's on the bench on another matter. If I  
9 could get back to you shortly, or the judge himself  
10 will get back to you. I hope it is only a matter of  
11 a minute or two.

12 MS. WIVELL: Ms. Miller, may I add one more  
13 thing.

14 MS. MILLER: Yes.

15 MS. WIVELL: There --

16 We are questioning, and I have just finished a  
17 line of questions that basically questions the  
18 adequacy of the scope of this particular search. We  
19 believe and we're attempting to show that there are  
20 documents which were excluded from the search as  
21 non-responsive, and in order for us to determine  
22 whether the company properly did what the court  
23 ordered, we need to see that list to determine  
24 whether or not it was a complete list or whether some  
25 limitations were placed on the scope of production

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1 since the definition of "document" which was provided  
2 in our request for production of documents was not  
3 provided to the employees.

4 MR. SCHNEIDER: Ma'am, I -- Ms. Miller, I  
5 would respond just briefly by saying that the --  
6 the -- the questions related to the content of a  
7 document, not the scope of the search. I don't think  
8 any of the questions today questioned the scope of  
9 the search. Ms. Wivell has not yet gotten to the  
10 scope of the search and the thoroughness in which the  
11 company was gone through. This document, we believe,  
12 was a document prepared for the litigation and  
13 therefore is work product. A determination as to its  
14 work-product nature, I don't think, can be made  
15 without the court seeing the document in camera, if  
16 necessary, but we did, as lawyers for the company,  
17 prepare a -- our summary of the kinds of documents we  
18 would need to broadly sweep to respond. Those  
19 documents -- those kinds of requests were shared with  
20 company employees, but they're work-product --  
21 work-product document that we -- we do not believe is  
22 discoverable.

23 We'd be happy to make a submission to the court  
24 on -- on that topic.

25 MS. MILLER: Thank you, counsel. I will

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1 consult with His Honor and get back to you shortly.

2 MS. WIVELL: Thank you.

3 MR. SCHNEIDER: Thank you.

4 MS. MILLER: Thank you.

5 (Teleconference concludes.)

6 (Videotape proceedings continued as  
7 follows:)

8 BY MS. WIVELL:

9 Q. Sir, does B&W understand it has a duty to obey  
10 all legal orders of the court in this case?

11 A. Yes, it does.

12 Q. Brown & Williamson has not asked for relief of  
13 any court orders that all responsive documents be  
14 produced no later than January 31st, 1996; has it, or  
15 that they be listed on a privilege log?

16 A. I don't believe --

17 MR. SCHNEIDER: Objection.

18 A. I don't believe it has.

19 Q. All right. Let me break it down to try and meet  
20 counsel's objection.

21 Brown & Williamson has not asked for relief from  
22 any court orders that documents that are responsive  
23 be produced by January 31st, 1996; right?

24 MR. SCHNEIDER: Objection.

25 A. I believe it has not.

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1 Q. And Brown & Williamson understood that there was  
2 an order that said that the privilege log would be  
3 produced on a rolling basis; correct?

4 A. I believe that's correct.

5 Q. Brown & Williamson has produced a privilege log  
6 of approximately 1,000 documents; right?

7 A. I understand they have produced eight different  
8 sections of privilege logs so far.

9 Q. Totally eight --  
10 Totaling approximately a thousand documents;  
11 correct?

12 MR. SCHNEIDER: Objection.

13 A. I don't know how many documents it includes.

14 Q. Sir, showing you what I have marked as  
15 Exhibit -- or what the court reporter has marked as  
16 Exhibit 17, I'm going to represent to you that is a  
17 partial of what we referred to as the 4A index  
18 provided by Brown & Williamson. I am not providing  
19 it to other counsel.

20 Have you ever seen any printouts from the 4A  
21 index?

22 MR. SIPKINS: Ms. Wivell, this is Peter  
23 Sipkins, and I'm sorry to interrupt your questioning,  
24 but because you were not present at the court hearing  
25 on Tuesday, I want to relate to you an agreement

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1 which I've reached with counsel for the plaintiffs  
2 who were present at that hearing.

3       We have agreed that with respect to the  
4 treatment of 4A indices at depositions such as this,  
5 that they will be treated as if they were Category II  
6 documents for purposes -- until there has been a  
7 determination by the court whether or not they are in  
8 fact entitled to such treatment. With respect to  
9 Category II, there is a very clear understanding that  
10 counsel present at the deposition who are trial  
11 counsel are able to participate in and be present  
12 during that discussion. With respect to the 4A, I  
13 believe it would be your position that they are not  
14 entitled to that same protection. But until there  
15 has been a ruling of the court with respect to that,  
16 I think that we have agreed that we will treat it as  
17 if they are Category II, which means that the court  
18 reporter needs to create a separate transcript with  
19 respect to the questioning that's done on both 4A and  
20 on Category II documents.

21           MS. WIVELL: Well I want to correct  
22 something. I was at the hearing on Tuesday and I  
23 know of no record made of this. Do you have an order  
24 to that effect?

25           MR. SIPKINS: I have an agreement with your

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1 co-counsel.

2 MS. WIVELL: All right. Let's call  
3 Roberta.

4 MR. GETSINGER: Before we do that, I also  
5 have a question. I wasn't part of that meeting, but  
6 I know there's counsel here from other states as  
7 well. I'm not sure if that agreement encompasses  
8 counsel from other states, but I think that's  
9 something we should clarify, perhaps when we're off  
10 the record.

11 MS. WIVELL: All right. Why don't we go  
12 off the record and we'll call Roberta.

13 THE REPORTER: Off the record, please.

14 (Recess taken.)

15 MR. SOLIMANO: During the break, counsel  
16 agreed that the state of Washington would leave  
17 during the next portion of Ms. Wivell's examination  
18 which will relate to the 4A indices. The trial court  
19 in the state of Washington has granted the state of  
20 Washington access to the 4A indices; however, they  
21 have not yet been provided to the state by the  
22 defendants. Accordingly, I am leaving the deposition  
23 at this juncture, but reserving the right to re-call  
24 this witness at such time as we do receive the 4A  
25 indices and have a chance to review them and

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1 determine that we have supplemental questioning we  
2 wish to do with this witness. And I assume you'll  
3 let me know when you're done with this line.

4 MS. WIVELL: Yes, sir, we will.

5 (Mr. Salimano leaves the deposition room.)

6 MR. SCHNEIDER: I would just add  
7 additionally that this section of the deposition will  
8 be marked "CONFIDENTIAL" pending further discussions  
9 between the parties.

10 THE REPORTER: All depositions are marked  
11 at least "CONFIDENTIAL." This portion will be marked  
12 "CONFIDENTIAL - QUESTIONS CONCERNING 4A INDICES."

13 MR. SCHNEIDER: Thank you.

14 (The following portion identified as  
15 "CONFIDENTIAL - QUESTIONS CONCERNING 4A  
16 INDICES" will be contained only in  
17 Plaintiffs' and Minnesota defendants'  
18 counsel's transcripts until clarification  
19 by the Court.)  
20  
21  
22  
23  
24  
25

- 1 BY MS. WIVELL:
- 2 Q. Sir, I have shown you what has been marked as
- 3 Exhibit 17 during the break; correct?
- 4 A. I believe you gave it to me before the break.
- 5 Q. This is a portion, I will represent to you, of
- 6 Brown & Williamson's 4A index concerning a file
- 7 folder entitled "CIGARETTE & TOBACCO SMOKING EFFECTS
- 8 RESEARCH, dash, 3,4 BENZL-PYREN TESTING & PATENT
- 9 670000;" correct?
- 10 A. That's what it says.
- 11 Q. And there are approximately 102 records, if we
- 12 look at the top of the document, if you look at the
- 13 last page.
- 14 A. There are 109 pages.
- 15 Q. 109?
- 16 A. This is marked page 109.
- 17 Q. Ah, okay. But at the top it says document 202
- 18 of 202; correct?
- 19 A. Document one of 102 to document 102 of 102.
- 20 Q. All right. And the first several of these
- 21 documents come from the folder entitled "CIGARETTE &
- 22 TOBACCO SMOKING EFFECTS RESEARCH" that I mentioned
- 23 before; right?
- 24 A. I don't know where this document came from.
- 25 Q. Well according to the face of the document, it

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1 says "FILE FOLDER: CIGARETTE & TOBACCO SMOKING  
2 EFFECTS RESEARCH - 3,4 BENZL-PYREN TESTING & PATENT  
3 670000;" doesn't it, sir?

4 A. Yes, it does.

5 Q. Assuming that these are correct entries and that  
6 the documents or the portions of this document which  
7 say "FILE FOLDER" and then the name of that document  
8 are correct --

9 Would you assume that for me, assuming that they  
10 did come from a file folder with that title?

11 A. I will.

12 Q. All right. Assuming that to be the case, it  
13 would lead you to believe that there are potentially  
14 responsive documents in this folder; correct?

15 A. I would respond that to determine whether the  
16 document is responsive, you would have to look at the  
17 requirements of the Minnesota case and the document  
18 in conjunction to make that determination.

19 Q. But at least on the face of the file folder, it  
20 would appear that the documents in the file folder  
21 relate to smoking effects research; correct?

22 A. That's correct.

23 Q. Now you understand that these documents concern  
24 Spindletop Research; right?

25 MR. SCHNEIDER: Objection.

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1 A. I note that Spindletop Research is mentioned in  
2 the title.

3 Q. And you know that Spindletop documents were the  
4 subject of a letter I wrote to counsel dated March  
5 25th, 1997; correct?

6 MR. SCHNEIDER: Objection.

7 A. I do not recall the -- the letter in question.

8 (Plaintiffs' Exhibit 18 was marked  
9 for identification.)

10 BY MS. WIVELL:

11 Q. Sir, have you ever seen Plaintiffs' Exhibit 18  
12 before?

13 A. I do not recall having seen this document  
14 before.

15 MS. WIVELL: Why don't we go off the record  
16 while you read it.

17 THE REPORTER: Off the record, please.

18 (Discussion off the record.)

19 BY MS. WIVELL:

20 Q. While we were off the record, you had the  
21 opportunity to read Exhibit 18; correct?

22 A. I have reviewed it.

23 Q. And that is a letter that I wrote to B&W's  
24 counsel requesting certain documents from project  
25 Boston Hilton, project Atlanta Hilton and work done

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1 at the Spindletop Research Center be produced;

2 correct?

3 A. That's correct.

4 Q. Now are you aware of the fact that these

5 documents had not been produced nor had they been

6 listed on a privilege log prior to last Friday?

7 MR. SCHNEIDER: Objection.

8 A. I was not aware of that.

9 Q. If these documents had not been produced and

10 were responsive to plaintiffs' requests and had not

11 been listed on a privilege log, then Brown &

12 Williamson did not meet its obligations under the

13 court orders for production of documents; isn't that

14 true, sir?

15 MR. SCHNEIDER: Objection.

16 A. Brown & Williamson reviewed documents to make

17 sure that all documents which were identified as

18 responsive were provided to the Minnesota case.

19 Every effort was made to deliver documents which were

20 responsive. There may well be documents which,

21 during the course of reviewing documents initially --

22 initially characterized as privileged which, upon

23 review, are identified as potentially responsive and

24 not privileged, in order to resolve disputes, which

25 will be subsequently produced. There are other

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1 documents which were reviewed and are considered not  
2 to be responsive. And I can't comment on any  
3 specific issue within this letter, but our outside  
4 counsel will be able to do that.

5 Q. Who would be able to do that?

6 A. Our outside counsel.

7 Q. Which outside counsel should we take the  
8 deposition of in order to do that, sir?

9 A. I don't believe --

10 MR. SCHNEIDER: Objection.

11 A. I believe that -- that the appropriate person to  
12 take in a deposition is me.

13 Q. But you can't answer that question; can you,  
14 sir?

15 A. I can't --

16 MR. SCHNEIDER: Objection.

17 A. I can't respond on specific -- on a  
18 document-by-document basis. I have prepared to come  
19 here to discuss the process that Brown & Williamson  
20 went through to deliver a substantial number of its  
21 documents which were identified as responsive to the  
22 Minnesota case. We've taken every effort and we've  
23 put in an awful lot resources to -- to -- to do that,  
24 and we believe we've done a very good job in  
25 delivering all of those documents.

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1 Q. Sir, you would agree that responsive documents  
2 were produced last Friday for the first time in this  
3 case by Brown & Williamson; right?

4 A. It is my understanding that additional  
5 responsive documents may be produced, they may still  
6 be produced to the -- the court in Minnesota. During  
7 the course of reviewing documents which have been  
8 identified as -- as privileged, they may be  
9 determined not to be privileged and they may be  
10 produced. In addition, there may be errors that are  
11 identified either because plaintiffs' lawyers have  
12 identified a document that they would like to see,  
13 and more than that, I understand that defense  
14 attorneys have indicated that if there are any  
15 documents that plaintiffs' lawyers want to request  
16 which are not privileged and which have not been  
17 identified as responsive initially, they will be  
18 prepared to -- to -- to provide them to the court.

19 MS. WIVELL: Objection, non-responsive.

20 Q. Sir, my question is simple: You would agree,  
21 wouldn't you, that there were responsive documents  
22 produced last Friday by Brown & Williamson; correct?

23 MR. SCHNEIDER: Objection.

24 A. I would agree.

25 Q. And you cannot tell me today that every single

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1 responsive document at Brown & Williamson has been  
2 produced; can you?

3 A. I can tell you that every document has been  
4 reviewed for responsiveness, and if it has been  
5 identified as responsive, it has been produced. And  
6 large numbers of documents have been produced in that  
7 way.

8 Q. Sir, can you testify today that every single  
9 responsive document has either been produced or  
10 listed on a privilege log pursuant to this court's  
11 order?

12 A. I don't believe that it's reasonable for any  
13 person, given the huge volume of documents, to agree  
14 that every single document that is responsive has  
15 been produced. There are millions of pages of  
16 documents that have been reviewed in a major effort.  
17 Errors could have been made. Other documents which  
18 have initially been identified as responsive -- as  
19 privileged may be further provided because, in review  
20 of that, in producing the privilege logs, it may be  
21 determined that they can be provided.

22 Q. When will Brown & Williamson be done with its  
23 privilege log?

24 A. My understanding is that it is in progress, and  
25 every effort is being prepared to produce it.

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1 Q. It's been in progress for two years; hasn't it?

2 When will Brown -- I'm sorry.

3 It's been in progress for two years; hasn't it?

4 MR. SCHNEIDER: Objection.

5 A. My understanding is that the court required it  
6 to be produced on a rolling basis, and that parts of  
7 the log have been produced already.

8 Q. When will it be done?

9 A. I do not know exactly when it will be done, but  
10 every effort is being made to produce it.

11 Q. Approximately when will it be done?

12 A. I don't know. I'll have to ask outside counsel.

13 Q. Would you please do that and get back to us?

14 A. Yes.

15 MR. SIPKINS: Excuse me, Ms. Wivell. May I  
16 make a comment?

17 MS. WIVELL: No, sir. We're not done.

18 Q. Sir, going back to Exhibit 17, some of the  
19 documents in here in Exhibit 17 were produced last  
20 Friday; weren't they?

21 A. I don't know the answer to that.

22 Q. Will you find out the answer to that and get  
23 back to us?

24 A. I'll do that.

25 Q. And you would expect that at the same time the

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1 documents were produced, if there were privilege  
2 claims that were made, Brown & Williamson would have  
3 produced a privilege log relating to the documents in  
4 Exhibit 17 which weren't produced; right?

5 MR. SCHNEIDER: Objection.

6 A. My understanding is that the privilege log would  
7 be produced on a rolling basis, and it will be  
8 prepared and provided in due course.

9 Q. The documents that were produced last Friday  
10 were produced in response to my letter, which is  
11 Exhibit 18; correct?

12 A. Dated March the 25th, yes.

13 Q. Is that right?

14 A. Yes.

15 Q. And these documents would not have been produced  
16 if I had not asked for them; would they?

17 MR. SCHNEIDER: Objection.

18 A. I cannot comment on whether a document would be  
19 produced. I can tell you that documents were  
20 reviewed as to whether they were responsive or not,  
21 in a good-faith effort, and if they were considered  
22 to be responsive, they were produced by December  
23 1996.

24 Q. Okay. How about --

25 Let me ask you this: How about a document

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1 entitled "Fetal Growth Retardation in Rats Exposed to  
2 Cigarette Smoke During Pregnancy," would that be a  
3 document that might be responsive?

4 A. You would have to look at the document request  
5 and the document itself to make a determination as to  
6 whether it were responsive.

7 Q. You've looked at the document request; haven't  
8 you?

9 A. Yes, I have.

10 Q. And that would be a document that would look to  
11 you like it ought to be produced, right?

12 MR. SCHNEIDER: Objection.

13 A. I'm not able to comment on a  
14 document-by-document basis. This was a task that was  
15 given to our outside counsel to review. They did a  
16 thorough job of reviewing documents to identify  
17 responsive ones and who prepared them. Documents  
18 that you have requested which were originally  
19 identified as non-responsive or privileged were not  
20 provided to you, and I understand that our outside  
21 counsel have offered to provide those documents that  
22 you request, provided that they are satisfied that  
23 they're not privileged.

24 Q. Let's -- let's address that point for a second.  
25 I just want understand here. So it's Brown &

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1 Williamson's position that we made -- we the  
2 plaintiffs made document requests for responsive  
3 documents at the beginning of this case; correct?

4 A. I understand that the court gave orders of what  
5 documents were to be produced, yes.

6 Q. Let's go back.

7 The plaintiffs made document requests about what  
8 should be produced; right?

9 A. That's correct.

10 Q. And Brown & Williamson objected and didn't  
11 produce a single document; did it?

12 MR. SCHNEIDER: Objection.

13 A. I don't believe that's correct. I believe that  
14 Brown & Williamson has provided in excess of four  
15 million documents.

16 Q. Oh. But that was after the court ordered it to;  
17 didn't it?

18 MR. SCHNEIDER: Objection, misleading.

19 Q. Prior to the court's order, sir, did Brown &  
20 Williamson provide even a single document in response  
21 to plaintiffs' request for production of documents?

22 MR. SCHNEIDER: Objection.

23 A. I don't know the exact date the first document  
24 was produced. I don't know the answer to that.

25 Q. Would you find out and get back to us?

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1 A. Yes, I will.

2 Q. But after the issue was addressed by the court,  
3 you understand that the court issued orders that  
4 Brown & Williamson provide documents responsive to  
5 plaintiffs' discovery requests; right?

6 MR. SCHNEIDER: Objection, misleading.

7 A. I understand that.

8 MR. SVOBODA: Excuse me, Ms. Wivell. As a  
9 matter of courtesy to the individual from Washington,  
10 is it time to bring him back in?

11 MS. WIVELL: Oh, I suppose we can bring him  
12 back in. Thank you.

13 (The portion designated "CONFIDENTIAL -  
14 QUESTIONS CONCERNING 4A INDICES" was  
15 conluded.)

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1 BY MS. WIVELL:

2 Q. Now is it Brown & Williamson's position, then,  
3 that having made discovery requests and having had  
4 the court rule on those discovery requests and order  
5 Brown & Williamson to provide responsive documents,  
6 it is now plaintiffs' responsibility to go back  
7 through the 4A's, pick out responsive documents and  
8 now ask for them?

9 MR. SCHNEIDER: Objection, misleading.

10 (Mr. Solimano returns to deposition room.)

11 A. I don't agree with that characterization. I  
12 would -- I would say that Brown & Williamson made a  
13 good-faith effort to go through all its documents  
14 using outside counsel and to identify those which  
15 were responsive and made a good-faith effort to  
16 produce those. As a matter of assistance to the  
17 plaintiffs, I believe that outside counsel made an  
18 offer that said if documents were -- were identified  
19 by the plaintiff from indexes that they received  
20 under a court order which had not been produced as  
21 responsive by outside counsel and they were further  
22 identified as non-privileged, then they would be made  
23 available to you.

24 Q. In other words, you're putting the onus back on  
25 the plaintiffs to go through the 4A's, pick out

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1 documents that someone at Brown & Williamson has  
2 decided are non-responsive even though they may  
3 relate to smoking and health by their very titles,  
4 and have not been produced or -- or put on a  
5 privilege log, and we're supposed to go through and  
6 find those documents and then ask for them again? Is  
7 that what your position is on behalf of your company?  
8 A. No.

9 MR. SCHNEIDER: Objection, form,  
10 argumentative, misleading.

11 A. No, it is not.

12 Q. I'm sorry. Explain it again what offer you've  
13 made to us so that I can get it right.

14 MR. SCHNEIDER: Objection.

15 A. If I can characterize the -- the offer: First  
16 of all, Brown & Williamson, through outside counsel,  
17 made a good-faith effort to identify responsive  
18 documents and provided those documents by the agreed  
19 date. In addition, there were certain databases  
20 which were produced at your request which contained  
21 lists of documents from earlier litigation which were  
22 also reviewed as part of the document production  
23 process and were determined either to be responsive  
24 or non -- non-responsive. Those which were  
25 determined to be non-responsive or privileged weren't

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1 to be provided in the Minnesota case.

2 If you determine from your review of the 4A that  
3 you have identified a document which has not been  
4 produced and which our counsel has looked at and  
5 identified previously that it is not responsive, then  
6 they have offered to produce it for you at -- for  
7 your -- your -- your benefit if it is not privileged,  
8 and I don't believe that there is a court order that  
9 requires that production.

10 Q. So the issue is essentially whether or not Brown  
11 & Williamson feels it's privileged or not -- or I'm  
12 sorry.

13 So the issue is whether Brown & Williamson feels  
14 it's responsive or not; right?

15 A. Documents are produced if they are responsive  
16 and not privileged, that's correct, and all documents  
17 that were identified as responsive and not privileged  
18 have been produced.

19 Q. All documents that were identified as responsive  
20 and non-privileged were produced; is that what you  
21 just said?

22 A. That's correct.

23 Q. How about a document entitled "RD&E Research  
24 Projects," was that document produced?

25 A. I cannot tell you whether a specific document

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1 was produced or not.

2 Q. All right. Would you check and find out for us  
3 whether a document dated May 27th, 1988, "Chronology  
4 of Projects," that lists by document date, project  
5 name, principals and research focus the research that  
6 Brown & Williamson/B.A.T. did relating to smoking and  
7 health, would you find out for me if that document's  
8 been produced in the Minnesota litigation?

9 MR. SCHNEIDER: Objection.

10 A. Yes, I'll do that.

11 Q. Sounds like it should be a responsive document;  
12 doesn't it?

13 MR. SCHNEIDER: Objection, argumentative,  
14 misleading.

15 Furthermore, Ms. Wivell, if you want to know  
16 whether particular documents have been produced or  
17 not, we can -- we can -- we've written you letters  
18 about it. This witness is not here to discuss and we  
19 can't go through --

20 MS. WIVELL: Oh, yes, this witness is here  
21 to discuss the production and collection of  
22 documents.

23 MR. SCHNEIDER: I don't -- I don't think  
24 that we should have to have this witness answer  
25 whether a particular document has been produced or

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1 not produced, is privileged, is going to be on the  
2 privilege log, is not going to be on the privilege  
3 log. Those are questions you asked us we've written  
4 you letters about, and I don't think it's the purpose  
5 of this deposition. The witness has undertaken --

6 MS. WIVELL: Well I object to your speech,  
7 Mr. Schneider, it violates the court's order.

8 MR. SCHNEIDER: I disagree.

9 BY MS. WIVELL:

10 Q. Sir, the document contains facts and facts only  
11 that listed the document date, the project name, the  
12 principals, and the research focus of smoking and  
13 health-related research done by B&W and B.A.T. Does  
14 that sound to you like it ought to be a responsive  
15 document?

16 MR. SCHNEIDER: Objection.

17 A. Whatever facts the document contain, the  
18 determination of whether it's responsive would have  
19 to be by review of the document against the  
20 requirements of the court in Minnesota.

21 Q. And how would we find out -- I'm sorry. I'm  
22 sorry.

23 You didn't answer my question. Let me go back  
24 and answer it -- ask it again. Based on your  
25 experience in this production and your education

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1 getting ready for this deposition, would the facts in  
2 a document containing the document date, the project  
3 name, the principals, and the research focus of  
4 smoking and health research conducted by B.A.T. and  
5 B&W be a document that sounds like it would be  
6 responsive to you?

7 MR. SCHNEIDER: Objection.

8 A. I have to agree that it sounds like it's related  
9 to smoking and health, but you would have to look at  
10 the specific requirements in the Minnesota case,  
11 which sometimes I -- I understand are specific in  
12 relation to the types of documents within that  
13 category that are required. And that document may or  
14 may not be responsive, but it would have been  
15 reviewed for such by our outside counsel, and if it  
16 has not been provided, it is either privileged or it  
17 has not yet been -- or has not been identified as  
18 responsive.

19 Q. Or it has not yet been identified as  
20 responsive?

21 Is the quest for responsive documents ongoing?

22 MR. SCHNEIDER: Objection.

23 A. All documents have been reviewed and assessed  
24 for responsiveness or not.

25 Q. They all have; is that what you just said?

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1 A. All the documents collected as part of a  
2 thorough process of reviewing documents in Brown &  
3 Williamson have been reviewed and a determination  
4 made as to whether they're responsive or not. If  
5 they're responsive and not privileged, they have been  
6 provided.

7 (Discussion off the stenographic record.)

8 (Telephone rings.)

9 MS. WIVELL: Hello.

10 MS. JONES: Hi, good morning. This is  
11 Michelle Jones, law clerk for Judge Fitzpatrick,  
12 calling for Martha Wivell and Richard Schneider.

13 MS. WIVELL: Speaking.

14 MS. JONES: Hi. Ms. Wivell, is Mr.  
15 Schneider available as well?

16 MR. SCHNEIDER: Yes, Ms. Jones, I'm  
17 present.

18 MS. WIVELL: And we happen to be on the  
19 record.

20 MS. JONES: Okay, great. I am calling in  
21 response to a call received this morning as well as a  
22 follow-up call by our court observer, Patricia  
23 Miller, in giving the judge's ruling on this matter  
24 that has come before the court regarding deposition  
25 and failure to answer.

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1           At this time the court would accept an in camera  
2 review of the scope document being requested or the  
3 information there of that scope document that  
4 plaintiff is seeking. The court will -- the court  
5 will opine to some devised plan as to how to receive  
6 at this time that document as well as the record  
7 indicating the questioning at that time. The court  
8 also would advise counsel to complete the deposition  
9 as -- as -- as you are able, and of course you've  
10 made a record of these issues, submitting that record  
11 as well as the in camera review, and the court will  
12 at that time make a determination if -- and allow a  
13 revisiting and allow you to continue the deposition  
14 after the in camera review upon the court's  
15 findings.

16           MS. WIVELL: What timetable are you looking  
17 at?

18           MS. JONES: That is something we have to  
19 work out with counsel. As far as how you'd like this  
20 to manifest itself as far as presenting the in camera  
21 review document and the record will be based upon  
22 counsel's ability to furnish that to the court. If  
23 you're able to do that, to get back to the court  
24 today, then the court will act accordingly. However,  
25 for --

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1           Perhaps you can propose some timing here on as  
2 to how you'd like to proceed with getting that  
3 information to the court.

4           MR. SCHNEIDER: Ms. Jones, this is Richard  
5 Schneider. I think that this may be an issue that  
6 comes up in a number of the depositions relating to  
7 the summaries that counsel make to look for  
8 documents, that we would certainly be happy to  
9 make -- to -- to make a submission to the court with  
10 a short brief and a copy of the document. I would  
11 suggest it be done over the course of the next five  
12 business days. And if that necessitates a resumption  
13 of this deposition to discuss those topics, we  
14 certainly would understand that. But I think that  
15 would give all the parties an opportunity to address  
16 this particular matter.

17           MS. WIVELL: Obviously --

18           This is Ms. Wivell. Obviously, I would  
19 appreciate having the answers to the questions today  
20 or tomorrow, but since I'm here by myself doing this  
21 deposition, I'm not sure I'm going to be able to get  
22 them to the court by the close of business today.  
23 That's what I -- that was what my preference would  
24 be. So I'm afraid that I'm going to have to suggest  
25 something else. But I don't think that a week should

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1 pass or five business days should pass. This is a  
2 relatively simple issue and I would suggest that the  
3 parties submit materials to the court by Tuesday.

4 MS. JONES: Mr. Schneider, any response to  
5 that?

6 MR. SIPKINS: Michelle Jones, this is Peter  
7 Sipkins speaking on behalf of Philip Morris and, I  
8 think, as liaison counsel.

9 This is, as Mr. Schneider suggested, an issue  
10 that relates to a number of defendants and there are  
11 ongoing depositions today in North Carolina where I  
12 think the same issue is being raised, so I don't  
13 think that we have a problem with submitting  
14 something by Tuesday. But I think we would like the  
15 opportunity to submit a short brief on behalf of the  
16 defendants as to why we believe that these indices  
17 are protected to -- are entitled to work-product  
18 privilege as long as the judge is going to be seeing  
19 these on an in camera basis, and I assume that the  
20 plaintiffs would like to submit a brief as well as to  
21 why they don't think that they are entitled to  
22 work-product privilege.

23 MS. WIVELL: Well actually, I think -- I  
24 think that -- that the court could probably deal with  
25 it just on the questions alone. I don't think

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1 briefing is necessary.

2 MS. JONES: Have defendants allowed the  
3 deponent to refresh her recollection from the actual  
4 documents?

5 MR. SCHNEIDER: We have not had the  
6 opportunity to do that. I believe that we can make a  
7 submission by Tuesday, the 15th, along with a copy of  
8 the document for the court's in camera review. And  
9 again, this is a document that summarizes the areas  
10 of documents that the lawyers were looking for in the  
11 company as part of the document-collection process.

12 MS. WIVELL: I would like the court to  
13 understand, I have not asked for the document. I  
14 have asked for the witness's recollection of what's  
15 in the documents. And then if he were not -- and he  
16 has been allowed to answer some of the categories of  
17 documents that are in the -- in the document. And he  
18 did tell me some of the categories, the broad  
19 categories of documents that were sought in the  
20 production. Then I asked for additional categories  
21 after he told me he knew more, and he -- and the  
22 instructions not to answer came. And I would have,  
23 after he had told me all he recalled, asked that his  
24 recollection be refreshed so that he could tell us,  
25 since this is a document custodian deposition

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1 concerning the collection and production of  
2 documents, what was the scope of documents which the  
3 employees at Brown & Williamson were asked to  
4 produce.

5       And this is a real issue because we have been  
6 discussing some documents which have not been  
7 produced which appear on their face by their titles  
8 or their file folders to be in smoking and health-  
9 related file folders and which we have not seen  
10 produced nor have they been listed on a privilege  
11 log. And it's a matter of great concern to the  
12 plaintiffs because we believe that documents, for  
13 example, documents including cigarette smoke-  
14 inhalation studies in in-bred Syrian golden hamsters,  
15 it has not been produced nor is it listed on a  
16 privilege log. Another document, "SH Rule Activity  
17 of Cigarette Smoke and Its Correlation with  
18 Carcinogenic Effects on Hamster and Lung Cultures"  
19 has not been produced nor has it been listed on a  
20 privilege log.

21       We have addressed a number of different subjects  
22 to Brown & Williamson in a letter dated March 25th,  
23 and last Friday six boxes of responsive documents  
24 appeared in the depository for the first time and the  
25 witness has testified they appeared in response to my

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1 letter. So we are quite concerned that the scope of  
2 documents which was requested of Brown & Williamson's  
3 employees was quite narrow, inappropriately narrow.

4 MR. SCHNEIDER: Ms. Jones, let me briefly  
5 respond. First of all, we're -- the issue at hand  
6 relates to a -- a scope statement prepared by lawyers  
7 to describe the scope of the search at the company.  
8 We believe that's a document prepared for litigation  
9 and therefore is a work-product document. We did not  
10 want the witness to answer questions about the  
11 content of the document because we believed the  
12 content of the document, just like the document  
13 itself, is work product.

14 Ms. Wivell's statements, I believe, are  
15 incorrect. I do not believe the witness has  
16 testified that any production has been made in  
17 response to Ms. Wivell's letters. Ms. Wivell's  
18 letters list various documents that are on B&W's 4A  
19 database that Ms. Wivell represents have not been  
20 produced with respect to the documents on the 4A  
21 database. Every single document on that database was  
22 reviewed, document by document, for production in the  
23 case. A determination was made as to each document  
24 as to whether it was or was not responsive.  
25 Documents determined to be privileged are in the

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1 process of being logged. We've already produced  
2 eight privilege logs and are continuing with that  
3 process, and it is a challenging one with thousands  
4 of documents at issue, but we are hard at work on  
5 it. The --

6 Ms. Wivell has not yet asked the witness about  
7 the extent and scope of the production, the  
8 thoroughness that all of the offices that were gone  
9 through. We think that when she gets to those  
10 questions she will understand the thoroughness of  
11 this production. These questions -- this -- these  
12 questions concern --

13 The issue before us now is whether or not a  
14 document prepared by lawyers to summarize the scope  
15 of their understanding of what needs to be gathered  
16 to make a responsiveness review is a document that's  
17 work product that the plaintiffs cannot get to. Ms.  
18 Wivell concedes, I guess, that she does not want the  
19 document. If she does not want the document, then I  
20 don't think it's appropriate to ask about the  
21 contents of the document.

22 MS. WIVELL: That's not correct.

23 MS. JONES: Okay, counsel. At this time  
24 the court will expect that submissions be made by  
25 Tuesday. Okay? So that would be next Tuesday that

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1 those submissions be received by the court, the  
2 defendants' brief, the in camera review, as well as  
3 the record containing the questions and plaintiffs  
4 briefing this as well.

5 MR. SCHNEIDER: Thank you.

6 MS. WIVELL: Thank you, Ms. Jones.

7 MS. JONES: Okay, then. Bye-bye.

8 MS. WIVELL: Bye-bye.

9 (Teleconference ends.)

10 MS. WIVELL: What time is it?

11 THE REPORTER: 11:37.

12 MS. WIVELL: Are we on?

13 THE REPORTER: We are.

14 MS. WIVELL: All right.

15 BY MS. WIVELL:

16 Q. Is it Brown & Williamson's position that it has  
17 complied with the court orders in this case?

18 A. Yes, it is.

19 Q. Based on what you know personally and you  
20 learned in preparation for this deposition, has every  
21 non-privileged, responsive document requested by the  
22 plaintiffs in this case been produced by Brown &  
23 Williamson?

24 A. As I said earlier, every document, after a  
25 thorough review, that has been identified as

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1 responsive has been produced.

2 Q. Based on what you know personally and what you  
3 learned in preparation for this deposition, has every  
4 responsive document requested by plaintiffs in this  
5 case which has not been produced been listed on the  
6 plaintiffs' privilege log?

7 MR. SCHNEIDER: Objection.

8 A. It has been listed on the privilege log if it  
9 has been identified as responsive and yet privileged,  
10 but the privilege log is still in the process of  
11 being produced. Some documents which are initially  
12 characterized as privileged may be identified as not  
13 privileged and may be produced at a later date.

14 Q. Are there records kept of which lawyer is making  
15 the decision about whether or not a particular  
16 document is privileged or not?

17 A. I understand that that's the case.

18 Q. What kind of records are being kept?

19 A. I believe that they're records kept by our  
20 outside counsel of the process that they're going  
21 through.

22 Q. So for each document there is a record of what  
23 counsel made the determination about whether or not  
24 the document was privileged or work product?

25 A. I understand that's the case.

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1 Q. And once that determination is made, is it  
2 reviewed?

3 A. Yes. The process is an initial determination  
4 and then a quality control check of that  
5 determination.

6 Q. All right. Let's talk about the initial  
7 determination. Who makes the initial determination?  
8 Where do those lawyers come from?

9 A. It --  
10 The lawyers in King & Spalding review the  
11 documents. The initial determination is made there.

12 Q. Any other lawyers?

13 A. We've engaged two law firms to produce documents  
14 in this case, so --

15 The initial review, though, is done by King &  
16 Spalding in Atlanta.

17 Q. What lawyers from King & Spalding are taking  
18 part in the initial review?

19 A. There are large numbers of -- of people involved  
20 in the review. Up to 200 at one time.

21 Q. King & Spalding had 200 lawyers reviewing  
22 documents for just -- for this case alone?

23 MR. SCHNEIDER: Objection, misleading.

24 A. There were up to 200 people working on various  
25 production issues in -- in Atlanta during this.

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- 1 Q. I -- I'm --
- 2 A. Yes.
- 3 Q. -- talking just about the lawyers.
- 4 A. Yes.
- 5 Q. Looking at the privilege, work-product issues.
- 6 How many people, lawyers from King & Spalding, worked
- 7 on that project?
- 8 A. My understanding is that numbers of lawyers, and
- 9 varied numbers because the -- the rates of production
- 10 was managed in order to achieve the deadline of -- of
- 11 December 1996, so it wasn't a constant number and
- 12 varied during the process.
- 13 Q. All right.
- 14 A. But large numbers of lawyers.
- 15 Q. Give me the -- the range of numbers.
- 16 A. I'll get back to you on the -- the range of
- 17 numbers.
- 18 Q. Thank you. I appreciate that.
- 19 Now I want to talk about the second level of
- 20 review of privilege issues alone. All right? How
- 21 many lawyers were working on that?
- 22 A. I believe we may be talking about 15 lawyers or
- 23 so.
- 24 Q. Are there still 15 lawyers working on that?
- 25 A. I believe it may be in that region.

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- 1 Q. That is your best answer on behalf of B&W, 15;  
2 right?
- 3 A. That's my recollection.
- 4 Q. Are they working full time?
- 5 A. That's my understanding.
- 6 Q. Who are these lawyers?
- 7 A. I don't know the names of individual lawyers  
8 working on the project.
- 9 Q. Would you find that out and get back to me,  
10 please?
- 11 A. I can do that.
- 12 Q. You will --  
13 Will you do that?
- 14 A. I will do that.
- 15 Q. Thank you.
- 16 What law firms are they from?
- 17 A. They're from King & Spalding.
- 18 Q. Any other law firm?
- 19 A. Not to my knowledge.
- 20 Q. Is Faegre & Benson from Minneapolis involved in  
21 any of the privilege issues in this lawsuit?
- 22 A. I'm not aware that they are. I -- my  
23 understanding would be that they would be -- they  
24 would be reviewing if --  
25 They would be conducting a final check before

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1 the documents and the privilege logs are provided  
2 to -- to the depository.

3 Q. What kind of a final check are they asked to do?

4 A. My understanding is that it's a -- a  
5 completeness check that --

6 Q. What do you mean by "a completeness check?"

7 A. Well my understanding is that a log is provided  
8 and a disk is provided, so it's sort of  
9 administrative control that things are complete, I  
10 believe.

11 Q. Is what you're saying is that their role is to  
12 check the document against the disk to make sure it's  
13 there and that the correct number of pages are there?

14 A. My understanding is that there is an  
15 administrative check to make sure that there is  
16 coherence in what is provided to the -- to the  
17 depository.

18 Q. I -- I don't understand. Would you explain what  
19 you mean by "there is coherence in what's provided to  
20 the depository?"

21 A. Well it's a question of --

22 I understand it's a question of marrying up  
23 disks and records.

24 Q. But just so we're clear here, no one from  
25 Minnesota is involved in the decision about whether

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1 or not a document is privileged?

2 MR. SCHNEIDER: Objection.

3 A. I don't believe that -- that they are.

4 Q. You would agree that there could be responsive  
5 documents -- I'm sorry, let me start again.

6 You would agree that there could be documents  
7 responsive to plaintiffs' discovery requests in this  
8 case which have not been produced and which are not  
9 listed on defendants' privilege logs; correct?

10 A. I would -- I would tell you that documents have  
11 been reviewed and all documents have been collected  
12 and reviewed, and if they have been identified as  
13 responsive they have been provided, provided they're  
14 not privileged, in which case they will be provided  
15 on -- or listed on a privilege log.

16 Q. Were there other candidates who were considered  
17 to be the company's spokesperson for this deposition?

18 A. I understand that David Grass may have been  
19 considered initially.

20 Q. And how did you understand -- understand that  
21 David Grass may have been considered?

22 A. David Grass was nominated as an individual for  
23 Brown & Williamson in the Castano case.

24 Q. So there has been a Rule 30 -- Rule 30  
25 equivalent deposition taken in Castano?

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- 1 A. I don't know.
- 2 Q. What --
- 3 David Grass used to be a B&W employee; right?
- 4 A. David Grass was and may still be, but I'm not
- 5 sure -- certain whether he still is.
- 6 Q. What's his position?
- 7 A. He is finance director for B.A.T. in Russia at
- 8 the moment.
- 9 Q. In -- in Russia now?
- 10 A. Yes.
- 11 Q. Was anyone other than you asked to come here as
- 12 B&W's spokesperson today?
- 13 A. Not to my knowledge.
- 14 Q. Do you know if anyone refused to testify on
- 15 behalf of B&W in this deposition?
- 16 A. I do not.
- 17 Q. Have you ever testified on behalf of B&W
- 18 before?
- 19 A. I have appeared as a -- a witness before, but I
- 20 have not testified. I've not given a deposition
- 21 before.
- 22 Q. What do you mean "appeared as a witness?"
- 23 A. I appeared as a witness in a grand jury
- 24 investigation on the issue of records management.
- 25 Q. And you gave testimony before the grand jury?

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1 A. I did.

2 Q. Did you testify before the grand jury in your  
3 individual capacity, or as you sit here today, as  
4 Brown & Williamson's spokesperson?

5 A. I don't recall the exact legal technical term  
6 for what my testimony was.

7 Q. When did you give that testimony?

8 A. In November 1996.

9 Q. You've never been deposed before?

10 A. I have not.

11 Q. Have you participated in the document collection  
12 or production in any other case alleging damages out  
13 of the use of cigarettes?

14 A. I don't believe that I have.

15 Q. Now you said you reviewed plaintiffs' requests  
16 for production of documents earlier. Did Brown &  
17 Williamson understand that those requests for  
18 productions required the company to search all of its  
19 company files to collect responsive documents?

20 A. I'm sorry.

21 MR. SCHNEIDER: Objection.

22 A. Could I back up to the previous question and  
23 maybe we can repeat this one?

24 Q. Sure.

25 A. I want to review my response.

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1 Q. All right. Fine. Go ahead.

2 A. I believe you asked me whether I participated in  
3 the collection of documents for any other cases other  
4 than Minnesota, and to the extent that documents have  
5 been collected in Minnesota which may be responsive  
6 in other cases, then my participation would have --  
7 would have been in other cases too.

8 Q. Fair enough.

9 So would it be safe to say that before you got  
10 involved with the Minnesota production in 1996, you  
11 hadn't been involved in any other productions for the  
12 company?

13 A. Again, perhaps, if I consider the internal audit  
14 review of document production, documents have been  
15 produced by Brown & Williamson in other cases, and  
16 our reviews were related to document collection  
17 generally.

18 Q. All right. You -- you've mentioned several  
19 different times the internal audit review. Have we  
20 talked about those audits in this deposition?

21 A. We have -- we have mentioned them in this  
22 deposition, yes.

23 Q. All right. Why don't you explain what internal  
24 audits you have conducted concerning documents.

25 A. Every internal audit by and large involves

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1 documents. If you are characterizing the document  
2 collection process for the Minnesota case as  
3 documents, then we did a -- an efficiency review in  
4 summer of 1995, in the early days of the -- of the  
5 process.

6 Q. And what did that review entail?

7 A. It entailed the auditor gaining an understanding  
8 of -- of the process that was going -- that was  
9 involved and reviewing the security, reviewing  
10 billings. And I believe we -- we discussed this  
11 earlier.

12 Q. All right. I'm just trying to find out if we've  
13 talked about all the internal audits that you're  
14 referring to when you refer to that process.

15 A. Yes.

16 Q. Are there any others?

17 A. No.

18 Q. Who was the auditor who conducted the audit in  
19 early 19 -- or in late 1995?

20 A. Therese McGuire.

21 Q. A he or a she?

22 A. A she.

23 Q. Brown & Williamson employee?

24 A. That's correct.

25 Q. Member of your department?

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1 A. That's correct.

2 Q. Now going back to my question that I asked that  
3 I think went unanswered, did Brown & Williamson  
4 understand that the request for production and the  
5 court orders required it to search all of its company  
6 files to collect responsive documents?

7 A. I think Brown & Williamson understood that it  
8 should search all premises and locations where it was  
9 considered that documents would be likely to be found  
10 which were responsive.

11 Q. Would you --

12 A. And indeed, Brown & Williamson did conduct  
13 searches through all locations where it was  
14 considered a reasonable estimate that documents would  
15 be found which may be responsive to the case.

16 Q. So the answer to my question is no, all company  
17 files were not searched for responsiveness; correct?

18 A. The process of -- of review, for example, in my  
19 department was one of saying what documents of this  
20 nature? Where do you keep your documents? What  
21 documents of this nature do you have? And where are  
22 they located? And if documents were as part of the  
23 review considered to be very unlikely to have any --  
24 any relevance, then they may not have been -- been  
25 included within the collection process.

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1 Q. So there were company files which were not  
2 reviewed for responsive documents; right?

3 MR. SCHNEIDER: Objection.

4 A. There were files which were reviewed in terms of  
5 their -- their content. They may not have been  
6 opened and gone through on a document-by-document  
7 basis simply because they were obviously not of a  
8 responsive nature; for example, files which include,  
9 you know, purchase orders perhaps.

10 Q. Well what --

11 A. Check ledgers.

12 Q. -- about documents that were misfiled in one of  
13 those files or deliberately placed in a file with a  
14 different file name, would that --

15 That document would not be produced; would it?

16 A. It very likely would not be produced, but, you  
17 know, there -- there are errors in every business,  
18 and no effort --

19 We put in a substantial effort to produce huge  
20 numbers of documents, and I think we're -- we're very  
21 proud of the effort that we put in. We believe we've  
22 complied with the court orders. We cannot offer a  
23 guarantee that we have produced every responsive  
24 document given the scale of and the duration of the  
25 effort that we've put in.

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1 Q. All right. Why don't you tell us about that  
2 effort. What did Brown & Williamson do to make sure  
3 it was responsive to the court's orders in the  
4 plaintiffs' document requests?

5 A. As I indicated earlier, we talked primarily  
6 about the review of current -- current records, and  
7 that process was one of initial interview, a  
8 discussion with Brown & Williamson employees at a  
9 large number of different premises including the  
10 Louisville corporate office, Macon in Georgia  
11 cigarette plant, Lancaster, Pennsylvania tobacco  
12 reprocessing facility, the Hanmer in Richmond tobacco  
13 reprocessing facility, the Wilson, North Carolina  
14 leaf processing plant, the Minnesota sales office,  
15 the Reidsville tobacco factory for the American  
16 Tobacco brands, and -- and during this process we  
17 interviewed -- up to 840 employees were interviewed  
18 and a large number of documents were collected and  
19 reviewed for responsiveness.

20 In addition to that current file review and a  
21 sweep of -- of huge, huge scope there was a review  
22 undertaken of documents which were held in archive by  
23 the outside law firm and a review of documents which  
24 had been collected previously for other litigation.  
25 The scope of the review involved large number of --

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1 of attorneys and produced in excess of four million  
2 documents which were considered to be responsive.

3 Q. Anything else?

4 A. Well I --

5 Can you please ask a more specific question to  
6 help me out?

7 Q. I was trying to find out everything that Brown &  
8 Williamson did to try and be responsive to the  
9 document requests and court orders that had been  
10 entered in this case. Is there anything else you can  
11 think of?

12 A. I think that gives a -- a general overview, but  
13 there may be more specific details that, if you were  
14 to ask, I may be able to provide.

15 Q. You mentioned a facility in Richmond that I  
16 didn't get. I -- I think you mentioned one. What  
17 was it, please?

18 A. It's a tobacco -- reconstituted tobacco  
19 reprocessing plant, Hammer.

20 Q. Can you spell that, please?

21 A. H-a-n-m-e-r.

22 Q. Now there were files at each one of the  
23 locations that were reviewed for responsive  
24 documents; is that right?

25 A. I believe that's correct.

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1 Q. Are there any other locations that were reviewed  
2 for responsive documents?

3 A. All Brown & Williamson locations were considered  
4 for review. Some were not swept because they were  
5 considered very unlikely to have any responsive  
6 documents.

7 Q. Now Brown & Williamson has over 30 sales offices  
8 throughout the United States; correct?

9 A. That's correct.

10 Q. And only one of those sales offices was reviewed  
11 for responsive documents; right?

12 A. That's correct. And my understanding is that  
13 consideration was given, and it was believed that  
14 while the Minnesota office would potentially have  
15 some specific documents relating to Minnesota which  
16 were required in this case, and some documents were  
17 provided from the Minnesota office, it's unlikely  
18 that there would be responsive documents which were  
19 not already provided from other locations which would  
20 be in existence at any of our other sales offices.

21 Q. So you cannot tell me as you sit here today that  
22 there are not responsive documents in the 29 other  
23 sales offices in the United States; correct?

24 A. I cannot tell you that. But I can tell you that  
25 based on the review that was done at Minnesota and

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1 the consideration that the company gave to where  
2 documents should be swept for, it's unlikely that  
3 there would be any responsive documents.

4 Q. Well, was anybody in these 29 offices even asked  
5 if they might have responsive documents?

6 A. I don't know of any specific individuals that  
7 were asked.

8 Q. Well, were all employees asked if they had  
9 responsive documents?

10 A. Certainly 842 people were interviewed in the  
11 process.

12 Q. And --

13 A. Not every employee. The process was one of  
14 starting out with the department head and agreeing  
15 with them which employees would be appropriate to  
16 talk to in order to identify responsive documents.  
17 In some cases it was not necessary to talk to every  
18 single employee, either because they had no files or  
19 because their files were shared files and it wasn't  
20 necessary to speak to everybody.

21 Q. So the answer to my question is no, every  
22 employee was not asked if they had responsive  
23 documents; right?

24 A. Not every employee, yes, I said earlier.

25 Q. There was no memo that went out to every Brown &

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1 Williamson employee asking if they had responsive  
2 documents; was there?

3 A. That's correct.

4 Q. Let me see if I understand the process then.

5 The heads of the departments were asked which  
6 employees they thought might have responsive  
7 documents?

8 A. The heads of the -- of departments were  
9 appraised of the process, and it was communicated to  
10 them the nature of the documents that were being  
11 sought. And then a determination was made as to who  
12 would need to be involved and which locations would  
13 need to be swept.

14 Q. And that determination was made by the  
15 department head; is that right?

16 A. On a --

17 Yes, that's correct.

18 Q. So the individual people who reported to that  
19 department head were not even asked, some of them, if  
20 they had responsive documents; correct?

21 MR. SCHNEIDER: Objection.

22 A. Large -- large numbers of them were asked if --  
23 if --

24 The department head determined, and I think in  
25 almost every case the department head would have said

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1 at least involve my direct reports, not necessarily  
2 all of my staff. Large numbers of people were given  
3 the opportunity to identify where the records were  
4 such that we're confident that all -- all locations  
5 where documents were likely to be responsive would  
6 have been swept.

7 Q. Well sir, does B&W have a -- a company  
8 newsletter?

9 A. Yes, we do.

10 Q. Was anything placed in the company newsletter  
11 asking people to check and see and let somebody know  
12 if they had responsive documents?

13 A. No, it was not. Because we felt that the  
14 process that we had gone through to identify where  
15 records were was sufficiently good and consistent  
16 that it wasn't effective or efficient to send out a  
17 general letter.

18 Q. But it could have been done; correct?

19 A. It could have been done. But on the other hand,  
20 we held individual meetings with collections of  
21 people and the communication process was handled in  
22 that way.

23 Q. With 840 people; right?

24 A. Some 840 people.

25 Q. And how many employees does B&W have in total?

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1 A. I believe I answered earlier that we have  
2 several thousand, including salespeople and including  
3 the hourly employees who work in our factories.

4 MS. WIVELL: It's noon. Why don't we take  
5 a break.

6 THE REPORTER: Off the record, please.  
7 (Luncheon recess taken at 12:00 o'clock  
8 noon.)

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1 AFTERNOON SESSION

2 (Deposition reconvened at 1:30 o'clock  
3 p.m.)

4 BY MS. WIVELL:

5 Q. Sir, when did David Grass go to Russia?

6 A. In March 1997.

7 Q. So this year.

8 A. That's correct.

9 Q. Why were you chosen to give this deposition  
10 instead of him?

11 A. David Grass was posted to England with B.A.T. on  
12 secondment in December 1995, at which time I  
13 succeeded him as audit director, so it was a natural  
14 progression for me to assume his role/function.

15 Q. Are you both B&W employees?

16 A. I'm a B&W employee. David Grass was a B&W  
17 employee. I'm not clear as to whether he's now a  
18 B.A.T. employee or whether he's still a B&W employee.

19 Q. When you say he was seconded to Russia -- am I  
20 paraphrasing that correctly?

21 A. I didn't say that. He was seconded to B.A.T. in  
22 London.

23 Q. What does that mean?

24 A. It means that you take on a temporary spell of  
25 duty doing work with a related company for a defined

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- 1 period of time.
- 2 Q. And the relationship between B.A.T. and B&W is
- 3 such that that happens often; doesn't it?
- 4 A. It appears from time to time, yes.
- 5 Q. Have you ever been a B.A.T. employee?
- 6 A. I have -- I have worked for another B.A.T.
- 7 subsidiary other than Brown & Williamson, yes.
- 8 Q. Which was what?
- 9 A. Which was Allied Dunbar.
- 10 Q. Out of South Africa?
- 11 A. No. Allied Dunbar is B.A.T. life and pensions
- 12 company in England.
- 13 Q. Have you ever worked for any other B.A.T.
- 14 subsidiary?
- 15 A. No, I have not.
- 16 Q. I want to go back and talk a little bit about
- 17 the documents that have been withheld as potentially
- 18 privileged. We covered that somewhat this morning.
- 19 How many documents have been withheld as
- 20 potentially privileged?
- 21 A. I don't know the exact number. My understanding
- 22 is that documents are withheld and are being
- 23 reviewed, so the exact quantity is yet to be
- 24 determined.
- 25 Q. Can you find out how many documents have been

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1 withheld as potentially privileged?

2 A. I'll consider that.

3 Q. Will you do that and then report back to us

4 tomorrow?

5 A. I'll consider that.

6 Q. Well I'm asking will you do it? "Yes" or "no."

7 A. I'll consider it and I'll let you know tomorrow

8 whether we'll come back to you on it.

9 Q. So the answer is no, you will not answer that

10 question tomorrow?

11 MR. SCHNEIDER: Objection, argumentative.

12 A. The answer is that I'll consider it and let you

13 know how we'll respond tomorrow.

14 Q. You don't know the answer right now; do you?

15 A. I don't know the answer.

16 Q. But you can find out the answer by asking King &

17 Spalding lawyers how many documents they have that

18 they are in the process of reviewing; correct?

19 A. I could do that.

20 Q. And will you do that and report back tomorrow?

21 A. Yes, I will.

22 Q. Thank you.

23 Because -- correct me if I'm wrong. Because you

24 said all responsive documents have been produced

25 except those that have been held back for potential

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1 privilege, all of the potential privileged documents  
2 should be in the possession of King & Spalding for  
3 review; correct?

4 MR. SCHNEIDER: Objection to the form.

5 A. I did not say that. I said that all documents  
6 which are considered responsive which have been  
7 identified as responsive have been produced, unless  
8 they are considered potentially privileged.

9 Q. Okay. But would it be fair to say that the  
10 responsive documents which are being considered and  
11 under review for potential privilege, have those been  
12 given to King & Spalding for review?

13 A. Documents which have been collected are in the  
14 possession of King & Spalding. They have been  
15 reviewed for responsiveness. And if they have been  
16 considered responsive, they have been provided.

17 Q. So the answer to my question is yes, if it is  
18 responsive and it is being considered for review for  
19 privilege, it is in the possession of King &  
20 Spalding; right?

21 A. Yes, it is.

22 Q. Thank you.

23 By the way, does Brown & Williamson and its  
24 lawyers have a system where the documents are  
25 computerized, where the images of the documents are

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1 computerized?

2 A. My understanding is that imaging of some  
3 documents is under way.

4 Q. Has document imaging taken place in the past?

5 MR. SCHNEIDER: Objection to the form.

6 A. Some documents have been imaged.

7 Q. When?

8 A. I don't know exactly when the first imaging was  
9 done. My -- my understanding is that it's a fairly  
10 recent development for Brown & Williamson.

11 Q. "Fairly recent." Give me your best  
12 approximation.

13 A. Perhaps six months or so.

14 Q. So correct me if I'm wrong here. Brown &  
15 Williamson and its lawyers do not have a computerized  
16 system where the images of the documents are  
17 available via computer; is that right?

18 MR. SCHNEIDER: Objection. Objection to  
19 the form.

20 A. My understanding is that a product like this is  
21 being prepared but is not yet complete.

22 Q. All right. Getting back to the documents which  
23 have been withheld as potentially privileged,  
24 approximately what percent of those documents have  
25 been listed on the privilege log so far?

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1 A. As I said earlier, I don't know exactly how many  
2 documents are being reviewed in total. I know that  
3 eight privilege lists have been provided so far. So  
4 I can't tell you what the percentage is.

5 Q. Have you reviewed those eight privilege lists?

6 A. No, I have not.

7 Q. So you don't know how many documents have been  
8 produced so far --

9 A. Well --

10 Q. -- on the privilege list.

11 A. No documents would have been produced on the  
12 privilege lists.

13 Q. Fair enough. Let me restate my inartfully-put  
14 question.

15 You don't know how many documents are listed on  
16 the privilege log; correct?

17 A. I do not.

18 Q. Are you aware of any documents which have been  
19 reviewed since the first of this year which were  
20 initially thought to be privileged where the decision  
21 was made that they are not privileged and will be  
22 produced?

23 A. My -- my understanding is that some of the  
24 documents --

25 And maybe I can take the opportunity to correct

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1 something that came up earlier. I believe I misspoke  
2 when I was asked whether Brown & Williamson had  
3 delivered a box of documents to you in response to  
4 your letter of the 25th of March, which is an exhibit  
5 in this case. I indicated that those documents have  
6 been delivered in response to that letter. My  
7 understanding in fact now is that the response -- the  
8 letter was responded to by a letter from King &  
9 Spalding indicating that they would provide you with  
10 the documents if they were appropriate to -- to be  
11 provided, and that the documents that you received on  
12 Friday were in fact documents which had initially  
13 been identified as privileged but subsequently,  
14 during review, were identified as -- as not  
15 necessarily privileged and given to you to avoid  
16 dispute.

17 Q. Have you seen this letter that allegedly came to  
18 me from King & Spalding regarding production of these  
19 documents?

20 A. Excuse me, which -- which document --

21 Which letter? Which documents?

22 Q. The letter that you just referred to that I  
23 supposedly received from King & Spalding.

24 A. I may have, but I -- I'm not certain that I've  
25 seen that letter.

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1 Q. Were you shown that over lunch?

2 A. No, I was not.

3 Q. Sir, the correction, if we can use that word, to  
4 your answer that you just gave occurred after you had  
5 the opportunity to speak to your lawyers during the  
6 lunch break; isn't that right?

7 MR. SCHNEIDER: Objection.

8 A. I -- I -- I wished to clarify the situation with  
9 my -- my attorneys, and I did that at lunch time.

10 Q. Did you wish to clarify it before or after they  
11 brought up the subject?

12 A. I don't recall whether I brought it up or they  
13 brought it up.

14 Q. But you understand that I received a letter from  
15 King & Spalding that said I was going to get these  
16 documents; is that right?

17 A. I believe that you had a response to your letter  
18 of the 25th of March that indicated that they would  
19 review the documents and give them to you if they  
20 were not privileged.

21 Q. Who told you that I'd gotten a letter from King  
22 & Spalding that said that?

23 MR. SCHNEIDER: Objection to the form.

24 A. Mr. Schneider.

25 Q. Did Mr. Schneider say that he had written that

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1 letter?

2 MR. SCHNEIDER: Objection, instruct you not  
3 to answer. That's discussions with counsel.

4 Q. Sir, if there is in fact no such letter, would  
5 that cause you concern?

6 Let me ask you this. If there is no such letter  
7 from King & Spalding, would that cause you concern as  
8 the spokesperson for Brown & Williamson?

9 A. If subsequently it came out to be that no such  
10 letter had been sent, I would be concerned sufficient  
11 to inquire into the reasons for that, yes.

12 Q. Fair enough.

13 Who would you inquire with?

14 A. Well assuming I was given an indication that no  
15 such letter existed, I would ask Mr. Schneider.

16 Q. Well sir, I'm telling you I received no such  
17 letter from King & Spalding. I'm saying that on the  
18 record. Will you then inquire as to why you were  
19 told that there was such a letter from King &  
20 Spalding?

21 MR. SCHNEIDER: Objection to the form.

22 A. I would -- I would answer that, A, I'm not -- I  
23 don't know to whom the letter was addressed. I don't  
24 know for sure that it would have been a letter  
25 addressed to you personally; it may have been

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1 addressed to somebody else. But I will consider to  
2 whom the letter was addressed and review the  
3 situation.

4 Q. Have any of the audits that you have been  
5 involved with investigated the production in Attorney  
6 General suits in other cases?

7 A. The audits that have been undertaken by and  
8 large looked at the document production process in  
9 general, they were not directed specifically at any  
10 specific case, whether it be Minnesota or any other.

11 Q. Have you been involved in the production of  
12 documents in Florida in the AG's case?

13 A. To the extent that documents have been swept and  
14 produced in that case, I have been.

15 Q. Have you been involved in the investigation --  
16 or I'm sorry, the -- the collection and production of  
17 documents from Texas?

18 A. My understanding is that those may have been  
19 some years ago, perhaps even before my period of  
20 employment with Brown & Williamson, but I'm not --  
21 not certain about that.

22 Q. You've not been involved in the current Texas  
23 Attorney General's litigation; have you?

24 A. I've not been directly involved in litigation  
25 for the Texas case.

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1 Q. Do you know if categories of documents were  
2 produced in Minnesota that were not produced in other  
3 attorney general's cases?

4 A. I'm not prepared to speak to that. I have  
5 prepared to -- to speak on the Minnesota case.

6 Q. That's what I'm asking you. I'm asking you if  
7 there were --

8 Well let me put it this way: Are there  
9 categories of documents that have been produced in  
10 other attorney general's cases that have not been  
11 produced in Minnesota's case?

12 A. I'm not aware of any such documents.

13 Q. Who would you ask in order to find out the  
14 answer to that question?

15 A. I would ask Mr. Schneider:

16 Q. Sir, does Brown & Williamson communicate with  
17 any of its employees through E-mail?

18 A. Yes, it does.

19 Q. Did Brown & --

20 Well who has E-mail?

21 A. E-mail is generally available throughout the  
22 company.

23 Q. Do all employees have access to E-mail?

24 A. All employees who have a work station have  
25 E-mail capabilities and access to E-mail.

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1 Q. Was an E-mail ever sent asking documents -- let  
2 me start again.

3 Was E-mail ever sent to all Brown & Williamson  
4 employees asking if they had documents responsive to  
5 the requests for production in this case?

6 A. No, it was not.

7 Q. You mentioned that several locations had been  
8 searched, and I'd like to go back and talk about some  
9 of those locations. You mentioned, I think, the  
10 corporate headquarters in Louisville; is that  
11 correct?

12 A. Correct.

13 MR. SCHNEIDER: May I interrupt just a  
14 moment?

15 MS. WIVELL: Yes.

16 MR. SCHNEIDER: I'm sorry to do this.  
17 This -- I don't have this very useful text scrolling  
18 here. I -- I don't know what I have. Could -- could  
19 you take a look at what I have here?

20 MS. WIVELL: Let's go off the record.

21 THE REPORTER: Off the record, please.

22 (Discussion off the record.)

23 BY MS. WIVELL:

24 Q. Sir, what's the address of the corporate  
25 headquarters in Louisville?

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1 A. It's Brown & Williamson Tower, 1501, I

2 believe -- 1501 Brown & Williamson Tower.

3 Q. What street?

4 A. It's -- it's on Liberty and --

5 I'm not sure what street it's on. I just go to

6 work there. P.O. box number is 35090, Louisville.

7 Q. Is it on Hill Street?

8 A. No, it's not.

9 Q. Were there any other locations searched for

10 responsive documents in Louisville?

11 A. The --

12 There's a -- an off-site storage facility which

13 was reviewed for responsive documents within

14 Louisville as well.

15 Q. What off-site storage facility?

16 A. Within --

17 Under the control of Pitney Bowes, there's a

18 document warehouse in Louisville.

19 Q. Is it the National Records -- Records Storage

20 Company?

21 A. I believe we used that for a period of time. I

22 don't believe we're using it today.

23 Q. Are there any documents kept by B&W at the

24 National Records Storage Company?

25 A. My understanding is not -- not any longer.

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1 Q. When did B&W stop using that storage facility?

2 A. I don't know exactly when.

3 Q. You said that there is a location that is

4 maintained by Pitney Bowes?

5 A. Correct.

6 Q. Is that right?

7 A. Correct.

8 Q. Where is that?

9 A. It's in Louisville. It's on either Main or  
10 Marshall Street. Main Street, it's on Main Street.

11 Q. Are there any other locations in Louisville that  
12 were reviewed for responsive documents?

13 A. In terms of main offices, I don't believe that  
14 there were.

15 Q. Well I'm not asking for main offices. I'm  
16 asking for any place in Louisville that B&W has  
17 space.

18 A. The process of sweeping the offices in  
19 Louisville involved reviewing with department heads  
20 all locations where documents were kept and  
21 maintained. As part of that we -- we went through  
22 every part of the Brown & Williamson Tower. As part  
23 of reviewing our archive records we went through the  
24 records warehouse that I mentioned earlier. So a  
25 thorough search was done of all recordkeeping

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1 locations in Louisville.

2 Q. Where is the Hill Street record room?

3 A. There is --

4 I don't believe there's such a thing as a Hill  
5 Street record room. Hill Street used to be Brown &  
6 Williamson's main facility some years ago before it  
7 moved into the -- the corporate tower.

8 Q. Would you take a look at the first page of  
9 Exhibit 17 where it says "AREA NAME," --

10 A. The Hill --

11 Q. -- then there's "LAW DEPARTMENT slash HILL  
12 STREET RECORDS ROOM."

13 MR. SCHNEIDER: Brief interruption. This  
14 is a question you're directing him to the 4A  
15 document. You're just asking for a reference to  
16 this --

17 MS. WIVELL: Yeah.

18 MR. SCHNEIDER: -- location. I think it  
19 would be hypertechnical to ask our friend from  
20 Washington to leave, but I want to preserve our  
21 objection.

22 Let's continue on that basis, if that's  
23 acceptable; no waiver of the objection.

24 MR. SOLIMANO: That's fine.

25 MR. SCHNEIDER: Okay. Fine.

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1 A. My -- my response to this, I believe this memo  
2 is dated 1966, at which time Brown & Williamson's  
3 head office was on Hill Street, Louisville.

4 Q. But isn't it true that there was a record  
5 storage facility located in Louisville at the Hill  
6 Street records room at 1600 Hill Street -- I'm sorry,  
7 1600 West Hill Street?

8 A. That may be the case. In fact, because Brown &  
9 Williamson moved its headquarters from Hill Street to  
10 its new corporate building in the mid-1980s, at that  
11 time records which were held at Hill Street were  
12 either stored in either the records storage warehouse  
13 or transferred into the new corporate offices.

14 Q. Can you explain --

15 A. The Hill Street office has subsequently been  
16 sold.

17 Q. Can you explain, then, to me how Kendrick Wells  
18 in his deposition taken in 1994 referred to a file  
19 storage facility located in the Hill Street's records  
20 room at 1600 West Hill Street?

21 MR. SCHNEIDER: Objection to the form.

22 A. Did he indicate what date that record storage  
23 facility existed?

24 Q. I'm sorry, I get to ask the questions in the  
25 deposition.

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1 A. Well my response is: My understanding is that  
2 this records facility may have existed in the past  
3 and very likely did exist in 1966 and more recently,  
4 but since the mid-1980s Brown & Williamson's  
5 corporate head office relocated from Hill Street to  
6 the Brown & Williamson Tower, leaving behind some  
7 research and development and perhaps some engineering  
8 facilities until mid-1993 or so.

9 Q. And it's your testimony on behalf of Brown &  
10 Williamson that Brown & Williamson no longer has any  
11 documents in any facility at Hill Street?

12 A. It is my understanding that those premises have  
13 been sold and that the process associated with  
14 leaving a building is to pull out all the important  
15 documents and assets that you can and move them, and  
16 that's the process we would have gone through.

17 Q. And you say that this occurred before the  
18 beginning of this decade; right?

19 A. The corporate office moved in the mid-1980s. As  
20 I said earlier, portions of -- of research and  
21 development moved from Hill Street down to Macon in  
22 the early 1990s. 1993 I think.

23 Q. I'm sorry, I'm still puzzled. Here, let me give  
24 you Mr. Wells' deposition and perhaps we can explore  
25 this and clear up my puzzlement.

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1                   (Plaintiffs' Exhibit 19 was marked  
2                   for identification.)

3 BY MS. WIVELL:

4 Q.    The date of this deposition, which is  
5 Plaintiffs' 19, is September 8th, 1994; correct?

6 A.    Yes, it is.

7 Q.    Would you turn to page 46 of this deposition.

8 Actually 45, beginning at line 20. There a question  
9 is asked:

10        "Maybe we ought to stop here so I can know what  
11 you're talking about because I've never been there  
12 before. The Brown & Williamson facility on this  
13 block, between 14th and 16th, or whatever it is, is  
14 all one big building." Question.

15        "That's correct." Answer

16        "Question: And it houses corporate  
17 headquarters?" Question.

18        "Answer: It houses offices of some research and  
19 development employees plus a guard's desk and perhaps  
20 maintenance offices are there as well, in addition to  
21 the large document work room."

22        Have I read that correctly?

23 A.    Yes, you have.

24 Q.    Are you familiar with the large document work  
25 room that's referred here?

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1 A. No, I'm not.

2 Q. Could you turn to page 89 beginning at line 21.

3 Am I correct that in part the answer reads: "The  
4 door to that facility room is locked, employees of  
5 Brown & Williamson in the building are aware there is  
6 a company policy they are not to enter that space.  
7 They are not permitted to."

8 Do you know what facility he's referring to?

9 A. Well I haven't read the preamble to line 21, --

10 Q. Uh-huh.

11 A. -- but I'm supposing that it is in reference to  
12 the Hill Street offices at the time.

13 Q. In 1994?

14 A. Yes. In -- in respect to dates, let -- let me  
15 clarify. When I joined Brown & Williamson in 1993 I  
16 recall that the decision had already been made to  
17 relocate research and development to our Macon  
18 facility where it would be close to the production  
19 facilities for business reasons. It may have been  
20 that it took some time for that transfer of research  
21 and development to actually happen. I recall the  
22 Hill Street premises, we were trying to sell those  
23 offices, and it took some time for that sale to --  
24 to -- to actually complete, partly because of some  
25 asbestos-clearing activities in getting the building

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1 ready. So my recollection was that we were out of  
2 the Hill Street building and we have sold it. It may  
3 have been that it was temporarily -- there were  
4 documents there during this period after 1993.

5 Q. Do you know -- do you --

6 Well this deposition was taken in 1994; right?

7 A. Right.

8 Q. All right. Do you know if there are documents  
9 still retained at the Hill Street's records room  
10 that's referred to in this deposition?

11 A. My understanding would be that they are not  
12 there.

13 Q. Will you check and report back to us tomorrow?

14 A. I could do that.

15 Q. Thank you.

16 What happened, in your understanding, to the  
17 documents that were kept in the Hill Street records  
18 room files?

19 A. Documents would have been transferred either  
20 into our records storage facility on -- on Main  
21 Street or, if they were active records, they would  
22 have been transferred with the R&D employees who were  
23 using those records.

24 Q. According to what we just read out of Mr. Wells'  
25 deposition, R&D employees were not allowed in that

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1 room, sir. It was a reading room for attorneys.

2 Will you check and find out what happened to the  
3 documents if they are no longer there?

4 MR. SCHNEIDER: Objection to the form.

5 A. My response was in -- in connection with any  
6 records while the building was in active use as a  
7 research and development center and not only relating  
8 to this records-retention storage area.

9 Q. All right. But I -- I just want to make it  
10 clear you have -- will check and find out what  
11 happened to the documents that were held in the Hill  
12 Street records room?

13 A. I told you what my understanding was as to the  
14 fate of those documents, and I will verify that for  
15 you.

16 Q. All of the documents, not just the R&D  
17 documents; right?

18 A. I can inquire into the status of documents, what  
19 happened to those documents in general terms, yes.

20 Q. Now in other references I have found reference  
21 to a vault at the Hill Street records room. Were you  
22 familiar with the fact that there was a vault there?

23 A. No, I was not.

24 Q. Will you find out if there was a vault at the  
25 Hill Street records room, and if so, what happened to

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1 the documents that may have been moved from it?

2 A. I will include that in my investigation.

3 Q. Thank you.

4 Have we talked about all of the facilities that

5 Brown & Williams has records stored at at Louisville?

6 A. I believe we have.

7 Q. Let's focus on Macon. R&D was moved in the '80s

8 to Macon; wasn't it, part of R&D at least?

9 A. I understand R&D moved down there in the 1990s.

10 Q. Okay. Fair enough. R&D moved to Macon in the

11 1990s; right?

12 A. Yes.

13 Q. In addition to documents which you say may have

14 gone with R&D employees to Macon, Macon also may have

15 generated its own documents; correct?

16 A. Yes.

17 Q. Was the Macon plant in its entirety searched for

18 responsive documents?

19 A. Macon was thoroughly reviewed as part of the

20 document sweep process, that's correct.

21 Q. Apart from the Lancaster, Pennsylvania facility,

22 the Hanmer facility at Richmond, the Wilson, North

23 Carolina facility, the Minnesota sales office and the

24 Reidsville facility, does Brown & Williamson have any

25 other offices or storage facilities?

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- 1 A. We have --
- 2 I can't remember whether you excluded other
- 3 sales offices. We have other sales offices. We have
- 4 a smokeless tobacco product plant in Winston-Salem.
- 5 We have a leaf warehouse in Blacksberg, South
- 6 Carolina.
- 7 Q. Any other facilities?
- 8 A. And we have the records storage facility in --
- 9 in Louisville which we have spoken about earlier.
- 10 Q. Have we covered it all?
- 11 A. I believe we have.
- 12 Q. By "a smokeless tobacco," do you mean snuff?
- 13 A. Snuff, roll-your-own chewing tobacco.
- 14 Q. Was that plant searched for responsive
- 15 documents?
- 16 A. I believe it was not.
- 17 Q. Was the Blacksberg -- Blackberg facility
- 18 searched for responsive documents?
- 19 A. No, it was not.
- 20 Q. Did any of the R&D employees who were originally
- 21 in Louisville end up in Winston-Salem or Blackberg?
- 22 A. Not to my knowledge.
- 23 Q. Will you check and find out?
- 24 A. My understanding would be since we don't have
- 25 any product research and development staff or

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1 facilities at either Winston-Salem or Blacksberg,  
2 that it would be highly unusual for one to be  
3 transferred there, unless, perhaps, they had a change  
4 of job responsibilities.

5 Q. Well I'm curious whether they took their files  
6 with them even if they had a change of job  
7 responsibilities, so would you check and see whether  
8 any R&D employees went from Louisville to  
9 Winston-Salem and Blacksberg?

10 A. At the time of the transfer. At the time of the  
11 relocation of R&D --

12 Q. Yes.

13 A. -- people from Louisville --

14 Q. Yes.

15 A. -- to Macon. I'll inquire.

16 Q. Thank you.

17 Were inquiries made of the in-house legal  
18 department at Brown & Williamson to see if they had  
19 responsive documents?

20 A. Yes.

21 MR. SCHNEIDER: Objection.

22 A. Yes, inquiries were made throughout the whole of  
23 the -- the corporate offices, including our in-house  
24 law department.

25 Q. And if a lawyer had responsive documents in his

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1 or her file, you would have expected them to make  
2 those available so that the lawyers who were doing  
3 the sweep could check to see if they were responsive  
4 and should be produced; right?

5 A. I would have expected that, yes.

6 Q. How about Brown & Williamson's current outside  
7 counsel, were their offices swept to determine  
8 whether they had any responsive documents?

9 A. No, they were not swept, but I do understand  
10 that they were asked whether they had any responsive  
11 documents which were not in the possession of Brown &  
12 Williamson.

13 Q. And how do you understand that request was made?

14 A. I don't know exactly how it was made.

15 Q. Was it made in writing?

16 A. I don't know exactly how the request was made.

17 Q. Will you find out and report back to me  
18 tomorrow?

19 A. I'll do that.

20 Q. Thank you.

21 How about past outside counsel, were their  
22 offices swept for responsive documents?

23 A. My understanding is that, yes, past outside  
24 counsel were asked about responsive documents.

25 Q. But were past outside counsel's offices swept?

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1 A. No, they were not swept.

2 Q. So as you sit here today, you would agree that  
3 you and Brown & Williamson cannot tell us for certain  
4 whether current and past outside counsel have  
5 documents that may be responsive to this discovery  
6 request.

7 MR. SCHNEIDER: Objection.

8 A. I don't believe anybody can tell you for  
9 certain. However, we made a good-faith effort to  
10 contact all -- all current and past attorneys' firms  
11 to establish whether they had documents in their  
12 possession which were not in the possession of Brown  
13 & Williamson which were responsive.

14 Q. How do you know that that took place?

15 A. I prepared for this deposition by meeting with  
16 outside counsel.

17 Q. How do you know that what they told you was  
18 correct?

19 A. I -- I believe them to be of good stature.

20 Q. Did you see any written evidence that they had  
21 been asked for responsive documents?

22 A. No, I did not.

23 Q. All right. Assuming that they told you  
24 correctly they had been asked, how did Brown &  
25 Williamson determine, if it did, that all of the

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1 responsive documents had been produced from outside  
2 counsel's files?

3 MR. SCHNEIDER: Objection to the form.

4 A. My understanding is that an effort was made to  
5 inquire into the existence of documents held by  
6 outside counsel which were not in the possession of  
7 Brown & Williamson. My understanding, too, is that  
8 by and large the responses were such that there is  
9 evidence that there is no such document in place, but  
10 there may be additional inquiries which are still  
11 under way with one law firm to establish whether that  
12 is -- is correct or not.

13 Q. What law firm are inquiries still under way  
14 with?

15 A. I understand that Shook Hardy may or may not  
16 have some documents, but we need to identify whether  
17 they do or not.

18 Q. When was Shook Hardy asked whether they had  
19 responsive documents?

20 A. I don't know the answer to that.

21 Q. Will you find out and report back?

22 A. Yes, I will.

23 Q. And I'm not sure I got an answer to my  
24 question. What quality control procedures did B&W  
25 put in place to determine that it had obtained any

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1 responsive documents that may be in the possession of  
2 its outside counsel or past outside counsel?

3 MR. SCHNEIDER: Objection.

4 A. Brown & Williamson has asked its outside counsel  
5 to prepare and produce responsive documents in the  
6 Minnesota case, and King & Spalding, I believe, have  
7 undertaken every effort to comply with the  
8 requirements of the -- of the court, including  
9 inquiring of outside counsel from -- of -- of at  
10 least 30 firms to ascertain whether they have any  
11 documents which are responsive or not which are not  
12 held in -- by Brown & Williamson. My understanding  
13 is that they've had responses from all those law  
14 firms and, subject only to the Shook Hardy firm,  
15 we're comfortable there were no documents which are  
16 responsive which are required to be produced in the  
17 Minnesota case.

18 Q. I understand that. But I'm asking how they  
19 became comfortable with that fact. What quality  
20 control procedures were in place, if any?

21 If there weren't any, just -- you can say that.  
22 But what made them comfortable with the answers that  
23 they were getting from their outside counsel or past  
24 outside counsel?

25 A. I think Brown & Williamson has relied on its

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1 outside counsel to do a good job on -- in this case,  
2 we have employed our internal auditors to review the  
3 processes, we have used an outside consultant to  
4 review the procedures that King & Spalding have gone  
5 through to collect documents, and we have reasonable  
6 assurances of a reasonable nature that they have been  
7 doing a good job to produce documents in the  
8 Minnesota case.

9 Q. Okay. What audit are you referring to?

10 A. The same audits that we talked about earlier in  
11 terms of understanding the processes and reviewing  
12 for efficiency and for security of the document  
13 production process.

14 Q. Correct me if I'm wrong. You told me you did  
15 one audit and it was in -- early in the process in  
16 1995; correct?

17 A. That's correct. We have another audit which is  
18 under way on law firm billings, which includes some  
19 of these aspects too.

20 Q. When did this other audit start?

21 A. That started a month or so ago.

22 Q. Basically the focus of that is to try to  
23 determine whether you're getting the best bang for  
24 your dollar; isn't it?

25 A. Its a re -- review of law firm billings and

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1 security aspects over the process.

2 Q. But it's not a review of completeness; is it?

3 A. That's correct.

4 Q. Now you said you hired an outside consultant.

5 Who is that?

6 A. We used Arthur Andersen.

7 Q. And what did Arthur Andersen do?

8 A. I believe that they reviewed the -- the -- the

9 process. They did some planning to ensure that all

10 possible locations were -- were visited and covered

11 in the sweep.

12 Q. Did this plan include -- I'm sorry.

13 Was there a written plan for this document

14 collection and production?

15 A. There's no --

16 I'm not aware of any one document that outlines

17 the plan.

18 Q. Well what processes did they review then?

19 A. I understand that they -- they reviewed the plan

20 to --

21 And this may not have been a document. They may

22 have done this by discussion and interview. But they

23 reviewed the overall process that King & Spalding

24 intended to adopt, and there are instructions to

25 produce documents for the Minnesota case, including

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1 where in Brown & Williamson were -- was it  
2 appropriate to go, how would we make sure that we  
3 covered all potential places where documents are  
4 kept, and made a very good effort to make sure that  
5 we did not miss any collections of documents in the  
6 process.

7 Q. All right. And that was the process within  
8 Brown & Williamson; right?

9 A. Within Brown & Williamson, and also at the -- at  
10 the law firms.

11 Q. All right. So did Arthur Andersen write a  
12 report?

13 A. I'm not aware of a written report from them.

14 Q. Would you check and see if there is a written  
15 report?

16 A. Yes, I'll do that.

17 Q. Did Arthur Andersen review the process by which  
18 outside counsel were asked for responsive documents?

19 A. Could you repeat the question, please?

20 Q. Fair enough.

21 Did the Arthur Andersen project review the  
22 process by which Brown & Williamson attempted to  
23 assure itself that any documents that were in the  
24 possession of its outside counsel, past or present,  
25 be produced?

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1 MR. SCHNEIDER: Objection.

2 A. I don't believe that -- that Arthur  
3 Anderson's -- the scope of Arthur Anderson's review  
4 was associated with that element of the -- the  
5 review, but I don't know.

6 Q. Will you check and find out?

7 A. Yes.

8 Q. Thank you.

9 What is it about the response from Shook, Hardy  
10 & Bacon that causes Brown & Williamson's counsel to  
11 think that it might not have all the answers from  
12 that law firm with regard to documents in its  
13 possession?

14 MR. SCHNEIDER: Objection to the form.

15 A. I only know that there is an outstanding  
16 question. I believe there may be some additional  
17 searches that Shook Hardy need to do to ascertain  
18 whether documents they have are in Brown &  
19 Williamson's possession or not. But I don't know.

20 Q. And what do you understand the question to be  
21 one more time so I can understand it clearly?

22 A. I understand that you asked me whether -- what  
23 it was about the response of Shook Hardy that led us  
24 to believe that we had not yet finalized our review  
25 of whether they had documents which were responsive

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1 in this case which are not in the possession of Brown  
2 & Williamson.

3 Q. When do you expect an answer to that question?

4 A. I don't know.

5 Q. Who asked the question?

6 A. I don't know.

7 Q. Will you find out the answers to those last two  
8 questions, please, and report back to us tomorrow?

9 A. I believe I may have -- have already said that  
10 I'd do that.

11 Q. Thank you.

12 Is Shook, Hardy & Bacon still representing Brown  
13 & Williamson currently as we speak?

14 A. I believe not.

15 Q. When did they last represent Brown & Williamson?

16 A. I don't know.

17 Q. Will you find out whether they still represent  
18 Brown & Williamson and report back?

19 A. Yes, I will.

20 Q. Thank you.

21 MR. SCHNEIDER: Ms. Wivell, there's some  
22 information that we may be able to provide to Mr.  
23 Lowther on this subject. Since you're questioning  
24 him about it now, rather than him waiting till  
25 tomorrow, --

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1 MS. WIVELL: All right. Why don't we take  
2 a break.

3 MR. SCHNEIDER: -- you might want to take a  
4 break, we'll chat with him, and as long as you're on  
5 that area now, you might be able to go over it and he  
6 can have it in mind.

7 THE REPORTER: Off the record, please.

8 (Recess taken.)

9 A. If I could clarify my one response relative to  
10 the Shook Hardy issue, my understanding was partly  
11 incorrect. I recalled that one issue outstanding  
12 with Shook Hardy was related to a request for  
13 information relative to original research, the only  
14 copy of which had been sent to outside counsel and  
15 was not in the possession of Brown & Williamson. My  
16 understanding is that that element is still to be  
17 confirmed, whether any of that exists or not with  
18 Shook Hardy. But outside of that, all outside  
19 counsel, past and previous, have been contacted and  
20 requested whether they have any documents responsive  
21 to the Minnesota case which Brown & Williamson does  
22 not have, and that investigation is complete.

23 Q. Well I've been asking you whether or not they  
24 had any responsive documents. Have your answers been  
25 limited to copies of responsive documents that Brown

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1 & Williamson does not have?

2 A. That is my understanding, yes.

3 Q. How is the determination being made that -- well  
4 let me start again.

5 King & Spalding, for example, has copies of  
6 Brown & Williamson documents; correct?

7 A. Yes, they have copies.

8 Q. All right. How is the determination being made  
9 that King & Spalding has turned over or has --  
10 doesn't have any copies, the only copy of a document  
11 for example?

12 MR. SCHNEIDER: Objection to the form.

13 Q. And it was a very bad question and I'll restate  
14 it.

15 Addressing the issue of the only copy of a  
16 document that may exist, whether or not it's in Brown  
17 & Williamson's possession or King & Spalding's  
18 possession, how is that determination being made?

19 A. The determination will be made by asking whether  
20 a document was held which was not a document which  
21 would have been a copy of an original document held  
22 by Brown & Williamson.

23 Q. Well how would they be able to tell whether it  
24 was a copy or an original?

25 A. Well I would say if a document is addressed to

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1 multiple parties, then it's a fair assumption that  
2 that's not an only copy.

3 Q. I'm still not understanding how that tells you  
4 whether it's the only copy in existence. You're  
5 assuming that there are other copies; is that what  
6 you're doing?

7 A. Brown & Williamson has for many years had a  
8 policy of preserving documents which are likely to be  
9 responsive in litigation. It's a reasonable  
10 assumption that if you see a document in a counsel's  
11 file that has other Brown & Williamson people on the  
12 distribution list, and in the normal course of events  
13 they would have had a copy of that document, to make  
14 the assumption that that document is in the  
15 possession of Brown & Williamson.

16 Q. Well I wasn't going to address  
17 document-retention policies in this deposition, but I  
18 have read Brown & Williamson's document-retention  
19 policy, and correct me --

20 Have you read it?

21 A. Yes, I have read it.

22 Q. Correct me if I'm wrong, but isn't the policy at  
23 Brown & Williamson that either the sender or the  
24 recipient, and I can't remember which one it is,  
25 keeps the copy, and everyone else throws their copy

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1 away?

2 A. The policy is actually that documents are kept  
3 if there is a legal or -- or business or tax  
4 requirement to keep a document. If a document is not  
5 required for any of those reasons, then it's not  
6 preserved past its normal -- normal date.

7 Q. I'm -- I'm not sure you answered my question.

8 Do all parties keep copies of the documents?

9 A. For --

10 Outside of -- of circumstances where documents  
11 are required for legal reasons, the rule at Brown &  
12 Williamson has been that the originator of the  
13 document keeps the document; recipients are not  
14 required to.

15 Q. And I'm still not understanding how that would  
16 affect whether or not King & Spalding or Shook, Hardy  
17 & Bacon or any of the outside counsel, how it could  
18 be told whether they have an original or a copy of  
19 the document. Can you help me?

20 MR. SCHNEIDER: Object to the form.

21 A. I don't understand the question.

22 Q. All right. What process did Brown & Williamson  
23 go through as part of this document discovery to  
24 assure itself that its outside counsel, whether it be  
25 King & Spalding or Shook, Hardy & Bacon, did not have

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1 the only copy in existence of a particular Brown &  
2 Williamson document?

3 MR. SCHNEIDER: Objection, misleading.

4 A. My understanding is that inquiries were made of  
5 all -- of some 30 law firms to establish whether they  
6 had documents which were responsive to the Minnesota  
7 case but which Brown & Williamson did not have the  
8 original document for -- of. That was the request.

9 Q. And I -- I'm sorry. How would counsel know  
10 whether Brown & Williamson had a copy of the  
11 document?

12 A. And my response to that is that they reasonably  
13 could -- could be assured that if Brown & Williamson  
14 was copied on -- if Brown & Williamson were copied on  
15 the documents, in the normal course of events, then,  
16 it likely would have been still in the Brown &  
17 Williamson files.

18 Q. But what check was done to actually assure that  
19 your assumption was correct?

20 A. No specific check.

21 Q. Going back to the Shook, Hardy & Bacon question,  
22 are you saying that you now know the answer or you  
23 don't know the answer about whether they have the  
24 only extant copy of Brown & Williamson documents?

25 A. I'm saying that as far as Shook Hardy is

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1 concerned, the -- the -- the question that has been  
2 raised and which is not yet fully answered, there's  
3 still some investigation under way, is as to whether  
4 they have been the recipient of original scientific  
5 research which is not in the possession of -- of  
6 Brown & Williamson and was not copied to Brown &  
7 Williamson.

8 Q. Who's doing the investigation?

9 A. Shook Hardy.

10 Q. Who on behalf of Brown & Williamson is going to  
11 check to make sure that their answer is correct when  
12 Shook Hardy responds to that investigation?

13 A. My understanding is that King & Spalding will  
14 review the response and make any additional further  
15 inquiries that they think are reasonable and  
16 necessary, depending on the results of that response.

17 Q. And who at King & Spalding is doing that?

18 A. I believe Doc Schneider would. Mr. Schneider.

19 Q. He's the one who's responsible for assuring that  
20 the answer received from Shook Hardy is a correct  
21 one?

22 A. That would be Shook Hardy's responsibility.

23 Q. And Doc Schneider's responsibility would be to  
24 assure that it's an accurate response?

25 A. I would expect that if he had no reason to -- to

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1 conduct further inquiries, then he would accept the  
2 response that he'd been given.

3 Q. Is Shook Hardy still representing Brown &  
4 Williamson?

5 A. I understand now that they are.

6 Q. Did Brown & Williamson ask -- strike that. Let  
7 me begin again.

8 Did Brown & Williamson check the homes or  
9 private property of current employees to see if any  
10 of their documents had been moved off Brown &  
11 Williamson premises?

12 A. No, they did not, and the reason for that is  
13 that it's company policy that documents should not be  
14 taken out of the work place.

15 Q. So if an employee writes a diary about what's  
16 going on at work at home, that document would not  
17 have been included in the production in Minnesota;  
18 correct?

19 A. That's correct. And if it had been a company  
20 record, the employee would not have been complying  
21 with company policy.

22 Q. Did Brown & Williamson do any investigation to  
23 determine whether or not employees had taken smoking  
24 and health or other responsive documents home?

25 A. Brown & Williamson has communicated its policy

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1 to all employees from time to time.

2 Q. I'm sorry, I don't think that answers my  
3 question. My question is: As part of this  
4 production, did Brown & Williamson do anything to  
5 determine whether any of its current employees have  
6 taken responsive documents home?

7 A. Brown & Williamson, in the course of conducting  
8 interviews with employees, asked whether they had any  
9 records which were responsive to the Minnesota  
10 requirements, without limiting where those documents  
11 were. So if an employee had perhaps taken records  
12 home, they would have had the opportunity to indicate  
13 that and they could have been included in the sweep.

14 Q. But no separate inquiry was made to all of the  
15 thousands of B&W employees about whether they had  
16 responsive documents at home or had taken them  
17 somewhere else; right?

18 MR. SCHNEIDER: Objection to the form.

19 A. The request to employees was: These are the  
20 kinds of documents that we're looking for. Do you  
21 have any? Where are they? Not are there documents  
22 in the office, but do you have any and where are  
23 they?

24 Q. So the answer to my question is no, a separate  
25 inquiry was not made to determine whether employees

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1 had taken documents off premises; right?

2 MR. SCHNEIDER: Objection, argumentative.

3 A. No question was asked during the -- the precise

4 "Do you have records at home?" that I am aware.

5 Q. Were former employees contacted to find out

6 whether they had documents responsive to the

7 discovery requests in this case?

8 A. No, they were not. As a general matter, no,

9 they were not.

10 Q. Well were there exceptions to that general

11 matter, sir?

12 A. We do from time to time have former employees

13 who work within our premises on company business, and

14 to the extent that that was the case, then yes, we

15 would have conducted an inquiry as to whether they

16 kept their records, and conducted sweeps accordingly.

17 Q. Does Brown & Williamson have consulting

18 agreements with any former employees?

19 A. Yes, we do.

20 Q. Which former employees does Brown & Williamson

21 have such agreements with?

22 A. I can't respond in connection with all of them,

23 but we have various former people who from time to

24 time do consulting work for the company.

25 Q. Were all people who have consulting agreements

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1 asked whether they had responsive documents?

2 A. I would say that to the extent that they had --  
3 that they were -- they were working from within our  
4 premises, we actually would have done a sweep of any  
5 documents that they held relative to this -- this  
6 case.

7 Q. So the answer to my question is no, they were  
8 not asked whether they had responsive documents;  
9 correct?

10 MR. SCHNEIDER: Object to the form.

11 A. The answer to the question is if they were  
12 currently engaged on a Brown & Williamson project and  
13 working within our premises, then they would have  
14 been included in this process.

15 Q. Well does that include people who have  
16 consulting agreements to consult on smoking and  
17 tobacco product-liability cases?

18 A. I'm not aware of -- of any Brown & Williamson  
19 former employees who are acting as consultants on  
20 matters like that.

21 Q. So does Brown & Williamson have a consulting  
22 agreement with Mr. Reynolds?

23 MR. SCHNEIDER: Objection. I believe that  
24 this is outside the scope of today's deposition. I  
25 will allow the question, but I don't want you to let

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1 my silence be an indication that I'm willing to go  
2 beyond the scope of this deposition.

3 A. I'm not aware of a current agreement with Mr.  
4 Reynolds.

5 Q. How about Dr. Sanford?

6 A. Mr. Sandifer?

7 Q. Mr. --

8 No. Mr. Sandifer is dead; isn't he?

9 A. Yes, he is.

10 Q. Isn't there a Dr. Sanford?

11 A. I'm not familiar with Dr. Sanford.

12 Q. Who were you aware of who has a consulting  
13 agreement to work with Brown & Williamson as a former  
14 employee on cigarette-related cases?

15 A. I'm not aware of anybody. If you're referring  
16 to cigarette-related cases, you mean legal  
17 questions?

18 Q. Legal matters, yes.

19 A. Legal matters.

20 Q. Did Brown & Williamson, in attempting to respond  
21 to this document request, talk to spouses of deceased  
22 former employees to see whether they had any  
23 responsive documents?

24 A. I don't believe that they did.

25 Q. So you don't know if, for example, Dr.

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1 Griffith's wife may have had responsive documents,  
2 for example.

3 A. I don't know. I can only say that the company  
4 policy not to have work-related documents at home is  
5 one that's been in place for a long time.

6 Q. Does Brown & Williamson have any subsidiaries?

7 A. Yes, it does.

8 Q. What subsidiaries does it have?

9 A. It has a large number of them. The -- the main  
10 ones are Brown & Williamson Japan, Brown & Williamson  
11 Korea, Brown & Williamson Mexico. From an operating  
12 standpoint, those are the main subsidiaries.

13 Q. What are the others?

14 A. There are various small subsidiaries that exist  
15 related to marketing activities. Diversified  
16 International Products is one I can recall. None of  
17 them have any substantial activities.

18 Q. Has the company requested --

19 Has B&W requested its subsidiaries to check  
20 their files to determine whether or not they have any  
21 responsive documents?

22 A. Brown & Williamson has reviewed with members of  
23 those subsidiaries whether there are likely to be any  
24 responsive documents in their control.

25 Q. Has Brown & Williamson transferred the legal

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1 right to any documents to any of its subsidiaries?

2 Let me rephrase that.

3 Has Brown & Williamson transferred the legal  
4 right to any responsive documents to any of its  
5 subsidiaries?

6 A. I don't really understand the term "transferred  
7 its legal right."

8 Q. In some kind of a legal arrangement, transferred  
9 the -- the ownership of the documents to any of its  
10 subsidiaries.

11 A. I'm not aware of any circumstance where Brown &  
12 Williamson has taken some of its documents and  
13 transferred its legal right to a subsidiary, no.

14 Q. Is this an issue that you personally have  
15 knowledge on?

16 A. Well, I can say that I'm aware of the scope of  
17 the activities of the subsidiaries, and I'm aware of  
18 the kinds of records that are kept in -- in  
19 subsidiaries and kinds of records that are kept by  
20 Brown & Williamson, and to my knowledge no such  
21 transfer has taken place.

22 Q. Who would you ask to find out whether such a  
23 transfer has taken place?

24 A. My understanding is, as part of the collection  
25 process for this case, inquiries were made as to the

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1 need to review records in some of these other  
2 locations to see whether there may be documents  
3 responsive, and based on information received at that  
4 time it was determined that it was very unlikely that  
5 any documents would exist.

6 Q. That's not my question.

7 Who would you ask to find out whether documents  
8 had been transferred to another entity so that they  
9 are no longer legally Brown & Williamson's?

10 A. My understanding is that inquiries of that  
11 nature have been made, and the kinds of people that  
12 may have been asked would be our in-house counsel,  
13 outside counsel, and management within the company.

14 Q. And do you know specifically that those  
15 questions were asked?

16 A. I understand those questions have been asked.

17 Q. And you understand that there are no documents  
18 in the possession or under the control of any  
19 subsidiary or affiliate corporation of Brown &  
20 Williamson; is that right?

21 MR. SCHNEIDER: Object to the form.

22 A. Could you repeat that question, please?

23 Q. All right. Is it your testimony that there are  
24 no responsive documents in the possession or under  
25 the control of any affiliate or subsidiary of Brown &

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1 Williamson?

2 A. I don't think I can -- I can confirm absolutely  
3 that there are no documents responsive at any  
4 affiliate or subsidiary. I can confirm that, in  
5 respect of subsidiaries which you've been talking  
6 about, a review was undertaken as to the need to  
7 include a sweep of their offices for the Minnesota  
8 case, and because of the kinds of documents that are  
9 retained and because of the advice of our in-house  
10 counsel and local management, it was determined that  
11 it was unreasonable to expect any document to exist  
12 which would be responsive in those locations.

13 Q. Does B&W have any affiliated corporations?

14 A. In the sense of fellow subsidiaries of Brown &  
15 Williamson, yes.

16 Q. All right. What are those?

17 A. Well we are -- we are a subsidiary of British  
18 American Tobacco Holdings, and ultimately that's a  
19 subsidiary of B.A.T. Industries. There are some  
20 intervening holding companies between Brown &  
21 Williamson Tobacco Corporation and B.A.T.(H) but  
22 there are other companies like BATCO, Souza Cruz,  
23 B.A.T. Germany, which are fellow subsidiaries of  
24 British American Tobacco Holdings.

25 Q. There are also fellow subsidiaries in Canada;

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1 correct?

2 A. In the case of Canada, my understanding is that  
3 Imperial Tobacco is owned by IMASCO, and that's an  
4 associated company, not a subsidiary of B.A.T.  
5 Industries.

6 Q. What's the difference between an associated  
7 company and an affiliated company?

8 A. It's a difference of control. We don't have  
9 more than 50 percent of the shares in Imperial  
10 Tobacco.

11 Q. Who is "we?"

12 A. The B.A.T. group.

13 Q. B.A.T. Industries is the "we" you were referring  
14 to before?

15 A. My understanding is that all tobacco interests  
16 are ultimately channeled through British American  
17 Tobacco Holdings.

18 Q. Up to B.A.T.?

19 A. Up to B.A.T. And I would --

20 My understanding would also be that B.A.T.  
21 Industries would hold the investment in IMASCO, which  
22 is the ultimate holding company of Imperial Tobacco.

23 Q. Are there affiliated companies in Australia?

24 A. B.A.T. has various subsidiaries all around the  
25 world. There is a company in Australia, yes.

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1 Q. Is there also a company in Austria?

2 A. I'm not -- I'm not aware of the exact legal  
3 establishment that we have in every country in which  
4 B.A.T. does business.

5 Q. Did Brown & Williamson, in doing its search for  
6 responsive documents in this case, contact any of its  
7 affiliated or sister corporations to determine  
8 whether it had any of Brown & Williamson's documents?

9 A. My understanding would be that relative to the  
10 requests in this -- this case, inquiries were made as  
11 to whether they had responsive documents.

12 Q. And that would include Souza Cruz?

13 A. I don't believe it would include Souza Cruz.

14 Q. Why not?

15 A. There's no relationship of any substantial  
16 nature between Brown & Williamson and Souza Cruz.

17 Q. Isn't it true that Souza Cruz is one of the  
18 locations that, under the agreements with B.A.T.  
19 Industries, Brown & Williamson has a right to obtain  
20 documents and information from?

21 A. My understanding of our relationship with Souza  
22 Cruz is that while we may share documents, I don't  
23 think we have a right to any documents of theirs.

24 Q. Well isn't that what the information-sharing  
25 setup under the pooling agreement is for, is to share

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1 documents and information?

2 A. I'm sorry, I'm not prepared to -- to answer  
3 questions on that particular document or that  
4 agreement. It's not something I'm currently very  
5 familiar with.

6 Q. Did B&W as part of its document collection  
7 process act -- ask B.A.T. whether or not it had any  
8 documents that were responsive to the requests in  
9 Minnesota?

10 MR. SCHNEIDER: Objection to the form.

11 A. I understand that inquiries were made of -- of  
12 B.A.T. during the course of the investigation for  
13 responsive documents, but sweeps of -- of B.A.T.  
14 records have not been undertaken, and I believe that  
15 B.A.T. has submitted its own responses in the  
16 Minnesota case.

17 Q. You referred to inquiries being made. What kind  
18 of inquiries were made of B.A.T.?

19 A. Well I think that one -- one inquiry that was  
20 made was relative to the issue of whether documents  
21 had been transferred from B&W to an affiliate company  
22 or not.

23 Q. Which was the affiliate company in question?

24 A. One of the affiliate companies was BATCO.

25 Q. And what was the answer to the question about

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1 whether documents had been transferred from B&W to  
2 BATCO?

3 A. My understanding is that no evidence of any  
4 transfer has been uncovered, and a number of efforts  
5 have been made to review whether such a transfer did  
6 take place.

7 Q. Has B&W incorporated any separately-incorporated  
8 entities that haven't been disclosed so far in this  
9 deposition to which it transferred documents?

10 A. No, I don't believe that it has.

11 Q. Is that something that you tried to educate  
12 yourself on in preparation for this deposition today?

13 A. Yes, it is.

14 Q. And you made inquiries as part of your  
15 preparation on that subject?

16 A. Yes, I did.

17 Q. Are there any documents that B&W has had  
18 translated into another language from English?

19 A. I'm not aware of any, but I could imagine that  
20 might happen from time to time.

21 Q. All right. Well let me be a little bit better  
22 with my question.

23 Are there any responsive documents that B&W has  
24 produced after it had them translated into another  
25 language and then produced only the other-language

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- 1 copy?
- 2 A. I'm not aware of any such documents.
- 3 Q. Were -- I'm sorry.
- 4 B&W has produced some documents in other
- 5 languages, like German; correct?
- 6 A. I'm not aware of that fact.
- 7 Q. Do you know if, assuming there have been
- 8 documents produced in German, that whether or not
- 9 translations were produced along with them?
- 10 A. I don't know.
- 11 Q. Have we talked about all of B&W's corporate
- 12 affiliates now?
- 13 A. I don't know that we talked about all
- 14 affiliates.
- 15 Q. Which affiliates haven't we discussed?
- 16 A. There are large number of companies within the
- 17 B.A.T. group which could be characterized as
- 18 affiliates. I don't know all of their names.
- 19 They're listed in the B.A.T. corporate reports.
- 20 Q. And did Brown & Williamson ask those affiliates
- 21 whether or not they had documents which were
- 22 responsive to the requests in this case?
- 23 A. My understanding is that we made a good-faith
- 24 effort to make inquiries relative to the transfer of
- 25 B&W documents of significant affiliates of Brown &

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1 Williamson.

2 Q. I -- I have trouble when you qualify it with  
3 "significant affiliates." Is it fair to say, then,  
4 that there are affiliates of B&W which it did not ask  
5 whether there were responsive documents?

6 MR. SCHNEIDER: Objection to the form.

7 A. There are affiliates --

8 There are large numbers of affiliates around the  
9 world. Reasonable inquiries were made of affiliates  
10 where a specific request was made as to whether  
11 transfers had been conducted to ascertain whether  
12 such transfers took place or not.

13 Q. But --

14 A. Including BATCO.

15 Q. -- as you sit here today, you cannot testify  
16 that that inquiry was made of all B&W affiliates; is  
17 that right?

18 A. I cannot tell you that.

19 Q. So there could be responsive documents in the  
20 files of those companies and we just don't know about  
21 them as we sit here today; right?

22 A. Well you can speculate that. But my response is  
23 that good-faith efforts were made to contact all  
24 affiliates which were likely to have such documents,  
25 and none were found.

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1 Q. You just don't know one way or the other; do  
2 you, sir, whether affiliates who weren't questioned  
3 about whether they had responsive documents might  
4 have such responsive documents?

5 A. No one will know without conducting a document  
6 sweep or further inquiries at those places.

7 Q. Precisely.

8 Is B&W a member of any trade groups?

9 A. Brown & Williamson has membership of The Tobacco  
10 Institute, and there may be others that I'm not aware  
11 of.

12 Q. Was a request made of The Tobacco Institute to  
13 determine whether or not it was in possession of any  
14 Brown & Williamson responsive documents?

15 MR. SCHNEIDER: Objection, misleading.

16 A. I don't know.

17 Q. Does B&W have access to any of its affiliates'  
18 or parent's computer databases?

19 A. There are databases which Brown & Williamson can  
20 access which are operated by its parent or  
21 affiliates, yes.

22 Q. What databases are those?

23 A. I can cite the Marksman database established for  
24 international property-rights control. There may be  
25 others, but I can't -- can't think of any at the

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1 moment.

2 Q. Are you familiar with INTERBAT?

3 A. I recall that I've heard something about  
4 INTERBAT. My understanding, again, is that it's not  
5 a Brown & Williamson database. There may be extracts  
6 that we can access.

7 Q. Is it your understanding that -- let me back up  
8 a little bit. Start over.

9 It's your testimony, then, that Brown &  
10 Williamson may access INTERBAT; correct?

11 A. Brown & Williamson may have the capability to  
12 have limited access to that database.

13 Q. Are there any other databases which B&W has  
14 access to from either its affiliates or its parent  
15 corporation?

16 A. Yes, there are.

17 Q. What are they?

18 A. Brown & Williamson has access to some B.A.T.  
19 bulletin boards, has access to some audit-type  
20 databases, risk-management databases in my group, and  
21 various other intercompany communication mechanisms.

22 Q. That's currently, B&W has access to those  
23 intercompany communications --

24 A. That's correct.

25 Q. -- or databases; correct?

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1 A. That's correct.

2 Q. Is there a computer group at B.A.T. that  
3 provides specialized computing facilities in support  
4 of R&D activities that's available -- whose services  
5 are available to B&W?

6 MR. SCHNEIDER: Object to the form.

7 A. I'm not aware of any specific IT organization  
8 that provides facilities in London for Brown &  
9 Williamson, research and development or any other  
10 element of Brown & Williamson's activities.

11 (Plaintiffs Exhibit 20 was marked  
12 for identification.)

13 BY MS. WIVELL:

14 Q. Sir, showing you what's been marked as  
15 Plaintiffs' Exhibit 20, which is identified as B.A.T.  
16 10481234 through 42, would you turn to page six,  
17 please, and read the paragraph to yourself at the top  
18 of the page.

19 MR. SCHNEIDER: While he's doing that, let  
20 me just enter this question to you, Ms. Wivell: Has  
21 this document been identified to us in your -- in  
22 your pre-designation?

23 MS. WIVELL: Yes. Well it was in my letter  
24 to Mr. Fribley two days ago.

25 MR. FRIBLEY: It was faxed to me, for the

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1 record, on a letter dated April 8th listing about  
2 eight exhibits, three of which are B.A.T., five are  
3 B&W, and my letter of April 7th to Ms. Wivell which  
4 made the offer about the 4A database. That was faxed  
5 two days ago and we got it yesterday -- it was faxed  
6 at the close of business on Tuesday, 4:52 p.m. in the  
7 Twin Cities, and then we received it in D.C. here  
8 yesterday afternoon.

9 BY MS. WIVELL:

10 Q. Have you had the opportunity to review the  
11 paragraph at the top of page six?

12 A. Yes, I have.

13 Q. That refers to a computing group; doesn't it?

14 A. Yes, it does.

15 Q. And it refers to a specialized computing  
16 facility in support of R&D activities; doesn't it?

17 A. Yes, it does.

18 Q. Do you understand that this computing facility  
19 is available to B&W?

20 A. My understanding, just from having read this, is  
21 that I can't say to whom it's available. I do know  
22 that R&D activity is conducted in Southampton from  
23 time to time and that there is communication between  
24 Brown & Williamson and Southampton related to R&D  
25 from time to time.

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1 Q. Well it refers to linking up by computer the,  
2 quote, main research laboratories around the world,  
3 close quote. You understand that B&W is one of those  
4 research facilities that's referred to; don't you?

5 A. I'm sorry, you asked me to read the one  
6 paragraph and I haven't read the foregoing.

7 Yes, Brown & Williamson is -- shares some  
8 research and development facilities and resources  
9 with other members of the B.A.T. group.

10 MR. BONNER: May I just interject this?  
11 Patrick Bonner, I'm counsel for B.A.T. Industries,  
12 BATCO and BATUKE. The document that has been marked  
13 as Exhibit No. 20 is a document that has been stamped  
14 "CONFIDENTIAL" by BATCO in this case. For the same  
15 procedures we have used, I think, I also want to note  
16 for the record that it's been handed to counsel for  
17 the state of Washington. I think that the procedures  
18 we used for the 4A indices that were marked as  
19 confidential ought to be employed for this particular  
20 document. We also need to clarify for the record how  
21 we're going to be handling marking confidential  
22 documents as exhibits because I'm not clear on how  
23 that operates.

24 MS. WIVELL: Just for the record, I've been  
25 handing the fourth copy of every document to the

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1 person sitting next to me, who just happened to be  
2 Washington counsel, and I assumed he was handing it  
3 down the table. Anyway, I apologize. It was an  
4 unintentional breach if indeed it was a breach, and I  
5 do apologize for that.

6 So what's your pleasure on how we treat this?

7 MR. BONNER: Well I think we should treat  
8 that confidential document the same way we treated  
9 the confidential nature of the 4A indices and use the  
10 same procedure, which is asking counsel for the state  
11 of Washington to leave the room while we are  
12 conducting a -- your examination of the witness on  
13 this document. And I'd also like -- if we have to go  
14 off the record for this to discuss it, but I need --  
15 I think we need a clarification on how we are  
16 handling the attachment of exhibits that are  
17 confidential to this -- to this transcript.

18 MR. SOLIMANO: Well taking the first  
19 subject first, are you saying that this document has  
20 not been produced in the state of Washington?

21 MR. BONNER: I'm not going to make a  
22 representation on that one way or the other. I'm  
23 just talking about the procedures that we are going  
24 to use for the deposition on a confidential  
25 document.

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1           MR. SOLIMANO: Well it strikes me this is  
2 different than 4A indices which we know has not been  
3 made available to the state of Washington. As you  
4 know, the state of Washington has been given a copy  
5 of all documents designated by the State of  
6 Minnesota, whether confidential or not, from the  
7 Minnesota depository, and in addition we have made at  
8 least two trips to England to review the B.A.T.  
9 production there. This issue comes as a surprise to  
10 me, so I haven't had an opportunity to check whether  
11 or not we have that in our own database.

12           MR. BONNER: I don't know the answer to  
13 that question either. I don't know if this document  
14 has been produced to the state of Washington. I  
15 couldn't possibly answer that question right off the  
16 top of my head. I could certainly find that out in  
17 short order.

18           MR. SOLIMANO: It is my understanding that  
19 under the Minnesota protective order, documents that  
20 are marked confidential cannot be filed unless  
21 they're under seal, and I'm willing to agree to abide  
22 by the Minnesota protective order with respect to  
23 this document.

24           MS. WIVELL: Why don't you step outside, if  
25 you'd be so kind, and we'll continue.

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1           MR. SOLIMANO: Well I will. I guess I will  
2 interpose an objection, though, at this point,  
3 because I'm here really at the request of Brown &  
4 Williamson, really as a convenience that this man not  
5 be redeposed again pursuant to the notice of 30(b)(6)  
6 depositions served in Washington. I was willing to  
7 step out during the 4A indices examination because  
8 it's clear those documents have not been yet provided  
9 in Washington. There has not been any such showing  
10 with respect to this document, and seems to me  
11 that -- that this process is becoming cumbersome and  
12 unworkable, frankly.

13           Having said that and noted my objection, I will  
14 step out so that the deposition can proceed.

15           MR. SCHNEIDER: Can I ask you just one  
16 question, counsel.

17           MR. SOLIMANO: Yeah.

18           MR. SCHNEIDER: Is there a protective order  
19 in Washington that protects against the circulation  
20 of confidential materials?

21           MR. SOLIMANO: Yes. I can't tell you off  
22 the top of my head how closely it tracks with the  
23 Minnesota order. However, there are -- there are, I  
24 believe, similar protections with respect to  
25 confidential documents in Washington; namely, we're

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1 not allowed to show them to anyone who isn't working  
2 on the case, we can't file them in court unless  
3 they're under seal. There may be some other  
4 restrictions as well.

5 MR. GETSINGER: Just a couple questions.  
6 When you say you have received documents from the  
7 depository, has that included both confidential and  
8 confidential Category I documents?

9 MR. SOLIMANO: To my understanding, we have  
10 not yet received the Category I documents.

11 MR. GETSINGER: Uh-huh.

12 MR. SOLIMANO: That's being discussed right  
13 now. It's my understanding those are under rather  
14 limited circulation.

15 MR. GETSINGER: And have you received any  
16 Category II documents, trade-secret formula  
17 documents?

18 MR. SOLIMANO: I can't tell you off the top  
19 of my head, but I believe the answer is no. I do  
20 believe we have received other documents that we  
21 stamped confidential.

22 MR. GETSINGER: And have you signed the  
23 undertaking that -- that was required by Judge  
24 Fitzpatrick in this case that would allow you to  
25 handle the Minnesota confidential documents? Or you

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1 don't know that maybe.

2 MR. SOLIMANO: I'm not entirely prepared to  
3 comment. It's my understanding that a similar  
4 procedure was set up in Washington, and I have signed  
5 the one in Washington.

6 MR. BONNER: Also for the record, I'm  
7 not -- I'm not quite sure if the state of Washington  
8 has signed the undertaking with respect to the  
9 Gilford, England confidential documents. I don't  
10 know whether or not that particular document has been  
11 produced in the state of Washington, and I'm not  
12 quite sure of the -- whether the scope of the  
13 Washington protective order covers the documents that  
14 are protected under the Minnesota protective order.

15 For all of those reasons, I think we should  
16 employ the same procedures we've had with the 4A  
17 indices for this particular deposition, and I will  
18 get this ironed out as quickly as possible so that we  
19 don't have this same situation occur tomorrow.

20 MR. SOLIMANO: Okay.

21 MR. BONNER: Before we proceed, there's  
22 another issue, though, and I don't know if we need to  
23 go off the record for this, but the issue is how are  
24 we protecting confidential documents that are marked  
25 as exhibits in all of these depositions? Because if

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1 they are part of all of the exhibits that are going  
2 to make -- be made publicly available, there needs to  
3 be some protection for the confidential documents  
4 because, as we all know, not everyone can get access  
5 to the confidential documents.

6 MR. SCHNEIDER: What I would suggest on  
7 that is that at a break we review the Case Management  
8 Order, make sure we have an understanding of that,  
9 confer with the court reporter and with counsel for  
10 the plaintiffs and come to a decision on it.

11 MS. WIVELL: Well, I'm here to take a  
12 deposition. I'm not here to enter into stipulations  
13 about documents. I would have assumed that this  
14 would have been done before we started the  
15 depositions. But what I'd like to do is take -- not  
16 take up any more of this witness's time than we need  
17 and allow counsel for the defense and the plaintiffs  
18 liaison counsel for the defense to iron out these  
19 problems at a later time and not take up this  
20 witness's time with that.

21 (Mr. Solimano leaves the deposition room.)

22 BY MS. WIVELL:

23 Q. Sir, have you had an opportunity to review the  
24 first paragraph under the title "The revised strategy  
25 for R&D in B.A.T." on the first page of this

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1 document?

2 A. Yes, I have.

3 Q. And in the last sentence it refers to  
4 significant research and development capabilities and  
5 resources which also exist in Australia, Brazil,  
6 Canada, Germany and the U.S.A.; correct?

7 A. It approximately says that.

8 Q. And sir, those are the major research -- I'm  
9 sorry. Let me ask it again.

10 Are those the major research facilities of  
11 B.A.T. Industries where research on cigarettes is  
12 carried out?

13 MR. SCHNEIDER: Object to the form.

14 A. I haven't prepared myself to respond to where  
15 major research facilities of B.A.T. Industries are  
16 kept. It's generally within my -- my knowledge that  
17 there are research and development departments at  
18 various parts of the world, and I would not be  
19 surprised that they exist in Australia. I know they  
20 exist in Brazil, Canada, Germany and the U.S.A.

21 Q. And the Brazil facility is the Souza Cruz  
22 facility?

23 A. That's correct.

24 Q. Are there any other facilities in Brazil?

25 A. Not that I'm aware of.

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1 Q. We've talked about Imperial in Canada. Are  
2 there any other Canadian facilities that you're aware  
3 of?

4 A. There -- there are -- there are B.A.T. --  
5 That B.A.T. has an interest in? Not that I'm  
6 aware of, no.

7 Q. How about in Germany, what is the facility  
8 that's referred to in Germany?

9 A. B.A.T. Germany has research facilities.

10 Q. And in Australia, what is the affiliate that has  
11 research facilities in Australia?

12 A. I understand that would be Wills.

13 Q. Are there any others?

14 A. In Australia, --

15 Q. Yes.

16 A. -- none that I'm aware of.

17 Q. And is Brown & Williamson the only facility in  
18 the United States that B.A.T. has associations with?

19 A. B.A.T. Industries has or B.A.T.(H) --

20 There are other group companies in existence  
21 other than Brown & Williamson within the U.S.

22 Q. But do they have research facilities concerning  
23 smoking-related issues?

24 A. Not that I'm aware of.

25 MS. WIVELL: Why don't we go off the record

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1 and invite the Washington counsel back in.

2 MR. BONNER: Before we do that, can I just  
3 ask: I think your letter the other day had two other  
4 BATCO confidential documents. I'm wondering if, in  
5 order to make this less cumbersome for the counsel  
6 for the state of Washington, are you going to examine  
7 on those documents?

8 MS. WIVELL: Not at this time, I'm not.

9 MR. BONNER: Okay.

10 MS. WIVELL: But I'm not going to tell you  
11 that I'm not going to, but I'm not --

12 Never mind.

13 MR. BONNER: At this time we can ask him to  
14 come back in?

15 MS. WIVELL: Yes.

16 MR. WILLOUGHBY: Can you do the other two  
17 now so he doesn't have to shuttle in and out?

18 MS. WIVELL: He's going to have to shuttle  
19 in and out.

20 (Mr. Solimano reenters the deposition  
21 room.)

22 BY MS. WIVELL:

23 Q. Sir --

24 MS. WIVELL: Oh, I'm sorry.

25 THE REPORTER: You're on.

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1 Q. Are you familiar with the database called LIMS?

2 A. I'm not familiar with it. I have heard of the  
3 database called LIMS.

4 Q. What do you understand it to be?

5 A. I understand it's a research and development  
6 database in Macon.

7 Q. Is it still active?

8 A. Yes, it is.

9 Q. Was that database searched for responsive  
10 documents?

11 MR. SCHNEIDER: Objection, misleading.

12 A. LIMS is a -- is a database of -- of additives  
13 and so on, not a -- not responsive documents.

14 Q. Can printouts be made of portions of the LIMS  
15 database?

16 A. Yes, they can.

17 Q. Would you tell me a little bit more about what  
18 is the database? As you said, additives, what kind  
19 of things are you referring to?

20 A. I'm not an expert on -- on what the LIMS  
21 database is. My understanding is this, it's related  
22 to a description of the product -- of our  
23 products, --

24 Q. Of the additives --

25 A. -- which may include additives or other, you

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1 know, ingredient information.

2 Q. Is it the kind of database where one can punch  
3 in the name of an additive and come up with the  
4 documents responsive to that additive or that include  
5 that additive?

6 A. I don't know. My -- my understanding relative  
7 to electronic records of documents is that inquiries  
8 were made as to whether electronic records of  
9 documents were held and whether these were held in  
10 paper form or not. If they were in paper form, they  
11 were produced if they were responsive and not  
12 privileged, and if they were -- if they were not,  
13 then they were not produced in conjunction with an  
14 agreement.

15 Q. B&W from time to time uses consulting  
16 laboratories; isn't that true?

17 A. Yes, it does.

18 Q. Were presently-utilized consulting laboratories  
19 asked if they had any responsive documents for this  
20 production?

21 A. I don't believe --

22 MR. SCHNEIDER: Objection.

23 A. I don't believe they were.

24 Q. What consulting laboratories is Brown &  
25 Williamson -- no, I'm sorry. Let me withdraw that

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1 question.

2 Q. In the past Brown & Williamson has used  
3 consulting laboratories to conduct research on smoking  
4 and health; isn't that true?

5 A. Yes, it is.

6 Q. Were these past consulting laboratories swept or  
7 at least consulted to determine whether or not they  
8 had documents responsive to plaintiffs' document  
9 requests in this case?

10 MR. SCHNEIDER: Objection.

11 A. I don't believe they were.

12 Q. So Battelle, for example, was not asked if it  
13 had responsive documents?

14 A. I've not heard of that organization.

15 Q. Could you turn to Plaintiffs' Exhibit 17,  
16 please. It refers to Spindletop Research Laboratory;  
17 correct?

18 A. Yes, it does.

19 Q. Was Spindletop requested to search for  
20 responsive documents?

21 A. I don't believe it was.

22 Q. Did Brown & Williamson ask any of the experts  
23 it's using in tobacco and smoking-related cases  
24 whether they had any responsive documents?

25 A. To the extent that inquiries were made of

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1 outside counsel, 30 outside counsel law firms, yes,  
2 they were.

3 Q. Are you saying that the request to outside  
4 counsel asked them to ask experts that they were  
5 working with whether there were documents responsive  
6 in the expert's possession?

7 A. No. I understood you to --

8 I included outside counsel as experts involved  
9 in, you know, smoking and health issues for the  
10 company, and we made inquiries of those, as I  
11 referred to earlier.

12 Q. Okay. The kind of experts I'm referring to are  
13 people who come in to court and testify on behalf of  
14 B&W as expert witnesses. Were presently-retained  
15 expert witnesses consulted about whether or not they  
16 had documents responsive to plaintiffs' document  
17 requests?

18 A. I don't believe they were.

19 Q. How about past experts, people who testified for  
20 past cases, were they questioned about whether or not  
21 they had responsive documents?

22 A. I don't believe they were.

23 Q. From time to time Brown & Williamson and its  
24 lawyers hire consultants; correct?

25 A. Yes.

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1 Q. And these consultants work -- do consulting work  
2 for Brown & Williamson and its lawyers relating to  
3 smoking and health issues; correct?

4 A. I'm not aware of any working directly for Brown  
5 & Williamson. That may be the case.

6 Q. That's why I included the lawyers.

7 From time to time Brown & Williamson's lawyers  
8 hire consultants to do consulting work with them on  
9 smoking and health-related issues; right?

10 A. Yes, they do.

11 Q. And were those consultants asked whether they  
12 had any responsive documents?

13 A. I don't --

14 MR. SCHNEIDER: Objection.

15 A. I don't believe they were.

16 Q. How about people who in the past have consulted,  
17 were any of the past consultants queried as to  
18 whether or not they had responsive documents in their  
19 possession?

20 MR. SCHNEIDER: Objection.

21 A. I don't believe they were.

22 Q. How about public relations firms, were the firms  
23 who do public relations for B&W asked whether or not  
24 they had responsive documents in their possession?

25 A. I don't believe they were.

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1 Q. How about individuals who'd been hired in the  
2 past to do public relations for B&W, were they  
3 queried as to whether or not they had responsive  
4 documents in their files?

5 A. I don't think so.

6 Q. How about lobbyists, what --

7 Did B&W ask its lobbyists whether they had  
8 responsive documents in their possession?

9 MR. SCHNEIDER: Objection.

10 A. I don't believe so.

11 Q. How about past lobbyists, were past lobbyists  
12 queried as to determine whether or not they had  
13 responsive documents in their possession?

14 A. I don't believe so.

15 Q. How about lobbyists that B&W hires in the State  
16 of Minnesota, were any of them asked whether they may  
17 have responsive documents in their possession?

18 MR. SCHNEIDER: Objection.

19 A. I don't believe so.

20 Q. Did B&W ask its accountants whether those firms  
21 had any responsive documents in their possession?

22 A. I don't believe they did.

23 Q. How about past accountants, were they asked  
24 for -- if they had responsive documents?

25 A. I don't believe so.

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1 Q. Did B&W ask its patent lawyers whether they had  
2 responsive documents or facts relating to this  
3 litigation in their files?

4 A. I don't know.

5 Q. Would you inquire and find out and report back  
6 to us tomorrow whether B&W made inquiry of its patent  
7 lawyers?

8 A. Yes, I'll do that.

9 Q. Thank you.

10 How about the members of the board of directors,  
11 were they queried about whether they had any  
12 responsive documents in their possession?

13 A. Yes, they were.

14 Q. Including past members of the board?

15 MR. SCHNEIDER: Objection.

16 A. Past members of the board, to the extent that  
17 they were retired and no longer employed by Brown &  
18 Williamson, were not. No inquiries were made of  
19 them.

20 Q. Were members of Brown & Williamson's executive  
21 committee asked if they had responsive documents?

22 A. Yes, I believe they were.

23 Q. How about files of former members of B&W's  
24 executive committee, were they checked to determine  
25 whether or not there were responsive documents?

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1 A. To the extent that those files were within the  
2 offices of Brown & Williamson, yes, they were.

3 Q. So if a former member of the executive committee  
4 had left -- (coughing) pardon me -- and taken his  
5 files with him, those documents would not have been  
6 produced; correct?

7 A. To the extent that that would have been a  
8 violation of -- of company policy for him to have  
9 taken his files with him, no additional inquiries  
10 were made as to whether they -- any files had been  
11 taken by them.

12 Q. Is it --

13 Could the same thing be said for officers and  
14 former officers of B&W?

15 A. The document collection process that I described  
16 earlier was a thorough sweep of all our premises at  
17 Louisville, and it included, therefore, the offices  
18 of the executives, large number of officers and  
19 directors of the company, and all of their files  
20 would have been considered for documents which may  
21 have been responsive.

22 Q. Does B&W do its own packaging of cigarettes?

23 A. Yes, it does.

24 Q. Where does it do that packaging?

25 A. Packaging is part of the manufacturing process

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- 1 in Macon, Georgia.
- 2 Q. So it prints its own boxes and so forth?
- 3 A. Yes, it does.
- 4 Q. And were those facilities swept for responsive
- 5 documents?
- 6 A. Yes, they were.
- 7 Q. From time to time Brown & Williamson hires
- 8 advertising agencies; correct?
- 9 A. Yes, it does.
- 10 Q. One of the reasons for that is it does market
- 11 research; right?
- 12 A. Well we -- we employ advertising agencies to
- 13 communicate the nature of our product to the smoking
- 14 public.
- 15 Q. And you also employ advertising agencies to test
- 16 potential ads; correct?
- 17 A. Yes, we do.
- 18 Q. And you try out new brands through advertising
- 19 agencies; right?
- 20 A. We try out new campaigns through advertising
- 21 agencies rather than new brands, I would say.
- 22 Q. And Brown & Williamson uses advertising agencies
- 23 in the regular course of its business to find out
- 24 about various segments of the market; correct?
- 25 A. Yes, we do.

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1 Q. And as part of its regular course of business,  
2 Brown & Williamson hires ad agencies in order to  
3 target particular markets; correct?

4 MR. SCHNEIDER: Object to the form.

5 A. I'm not sure that I -- I -- I understand the --  
6 the question.

7 Q. Well, Brown & Williamson uses advertising  
8 agencies to do market analysis to tell it which part  
9 of the market its products appeal to; right?

10 A. That's correct.

11 Q. And that's part of its regular business, isn't  
12 it -- isn't it?

13 A. Yes.

14 Q. And as part of its regular business, the  
15 advertising agencies that do these various things  
16 make reports; right?

17 MR. SCHNEIDER: Objection to the form.

18 A. I'm sure advertising agencies report back to  
19 Brown & Williamson on the nature of the activities  
20 they conduct in servicing our -- our needs.

21 Q. And those reports can take the form of written  
22 presentations or oral presentations through  
23 overheads, things like that; right?

24 A. Yes, they do.

25 Q. And that's part of the regular business of Brown

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1 & Williamson, to collect that kind of information;  
2 isn't it?

3 A. That's one of the ways in which we conduct our  
4 affairs, yes.

5 Q. And those kinds of -- of files --

6 Those kinds of records are found in the files of  
7 Brown & Williamson; right?

8 A. Yes, they are.

9 Q. Let's focus on the advertising agencies for a  
10 second. Did Brown & Williamson talk to its former ad  
11 agencies to determine whether or not there were any  
12 responsive documents in their files?

13 A. I don't believe they did.

14 Q. How about their present advertising agencies,  
15 did Brown & Williamson talk to any of its present ad  
16 agencies to determine whether or not they had  
17 responsive documents?

18 A. I don't believe they did.

19 Q. Does Brown & Williamson use flavor houses?

20 A. We use flavors in our product, yes.

21 Q. But do you use flavor houses; in other words,  
22 businesses such as Kimberly Clarke as flavor houses?

23 MR. SCHNEIDER: Object to the form.

24 A. There are companies that supply us with flavors  
25 which we use in our products.

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1 Q. What companies supply Brown & Williamson with  
2 flavors that they use in their products?

3 MR. SCHNEIDER: Object to the form.  
4 Furthermore I object, this is outside the scope of  
5 the deposition. I think this is a -- a question more  
6 properly directed at Category II information, and we  
7 had agreed in advance of this deposition that that  
8 would not be within the scope of this deposition.

9 MS. WIVELL: Oh, Mr. Schneider, I object to  
10 your statements. I know of no such agreement. And  
11 I'm merely trying to find out what companies are used  
12 so that I can ask whether their files were reviewed  
13 for responsive documents or whether they were asked  
14 to make inquiries.

15 MR. SCHNEIDER: The identity of the  
16 companies is protected information in and of itself.  
17 That's a Category II area. Ms. Walburn has written a  
18 letter about this deposition today regarding document  
19 production and collection and has specifically set  
20 forth in writing that Category II is not within the  
21 scope of this deposition.

22 MS. WIVELL: All right. What I'm going to  
23 do is postpone asking that question. I'm assuming  
24 you're instructing him not to answer; is that  
25 correct?

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1 MR. SCHNEIDER: Yes, I am.

2 MS. WIVELL: I will talk with Ms. Walburn  
3 and revisit this issue after I have talked with her  
4 about it.

5 MR. SCHNEIDER: Thank you very much. I  
6 appreciate that.

7 BY MS. WIVELL:

8 Q. Has B&W microfilmed some of its documents?

9 A. Yes, they have.

10 Q. What microfilm -- I'm sorry. What documents --  
11 let me start again.

12 Were all microfilmed responsive documents  
13 reviewed?

14 A. I understand that they were reviewed for  
15 responsiveness.

16 Q. What type of document has B&W microfilmed?

17 A. I'm aware of invoices that have been  
18 microfilmed.

19 Q. Any other documents?

20 A. I am aware of another category of documents, I  
21 can't recall exactly what -- what those documents  
22 are.

23 Q. All right. But generally what do you understand  
24 the subject matter of those documents to be?

25 A. I can't recall.

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- 1 Q. Does B&W have a film library?
- 2 A. I don't believe it does.
- 3 Q. Does it have a video library?
- 4 A. We have a training department which holds some
- 5 videos.
- 6 Q. Was the training department reviewed or swept
- 7 for responsive documents, --
- 8 A. Yes.
- 9 Q. -- keeping in mind that films and videos fall
- 10 within the definition of documents?
- 11 A. Yes, it was.
- 12 Q. Does B&W keep any other kind of slides or
- 13 photographs?
- 14 A. Yes, I believe they do.
- 15 Q. What department keeps slides or photographs?
- 16 A. Various departments. I have some within my own
- 17 department.
- 18 Q. Of presentations you've made?
- 19 A. Yes.
- 20 Q. What else are the subject of the slides and
- 21 documents -- or slides and photographs?
- 22 MR. SCHNEIDER: Object to the form.
- 23 A. Are we talking about within my department?
- 24 Q. Yes.
- 25 A. The slides of presentations that I have made.

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1 That's all.

2 Q. Does R&D keep slides and photographs?

3 A. I don't know.

4 Q. Do you know -- so you don't know whether -- let  
5 me start again.

6 Would you check and see whether R&D keeps slides  
7 or photographs, and if so, were they checked for  
8 responsiveness?

9 A. I can respond that R&D was included in the  
10 review for responsive documents, and any slides or  
11 photographs that may have been possibly responsive  
12 would have been included for review in the process.

13 Q. Now you're in charge of the risk management  
14 department; correct?

15 A. That's correct.

16 Q. And does risk management include communications  
17 of the assessment of risk with B&W's insurance  
18 companies?

19 A. There is correspondence relating to insurable  
20 risk with our insurance companies, yes, within the  
21 risk management department.

22 Q. And was that correspondence reviewed for  
23 responsiveness?

24 A. Yes, it was.

25 Q. Were all responsive, non-privileged documents

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1 produced relating to the risk management department?

2 MR. SCHNEIDER: Objection.

3 A. The risk management department was thoroughly  
4 swept, as were all offices within the Brown &  
5 Williamson Tower, and any documents that were  
6 identified as potentially responsive were taken away  
7 and reviewed to determine whether they were  
8 responsive or not. If they were found identified as  
9 responsive, they were provided, unless they were  
10 privileged.

11 Q. How many documents were taken from your  
12 department, sir?

13 A. I don't know the exact number.

14 Q. Approximately how many were taken?

15 A. I don't know that I could tell you a close -- I  
16 would --

17 I would expect there would be about 20 to 30  
18 also.

19 Q. Were all of the documents returned to you that  
20 were taken?

21 A. Yes, they were.

22 MS. WIVELL: I would like to take the  
23 afternoon break.

24 THE REPORTER: Off the record, please.

25 (Recess taken.)

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1           MR. BONNER: This is Patrick Bonner again.  
2 I'd like to get on the record the continuation of my  
3 objection to the introduction into -- as an exhibit  
4 into this deposition of Exhibit No. 20, which is a  
5 BATCO confidential document 104814334 through  
6 104812342.

7           I believe the use of confidential documents or  
8 the disclosure of confidential documents is covered  
9 by paragraph 10 of the protective order, which is  
10 dated June 15th, 1995. I have a copy of that  
11 protective order in my hand. It appears that to the  
12 extent that -- well let me -- let me step back a  
13 second.

14          Paragraph 10 deals with the ability of counsel  
15 to disclose confidential documents. Paragraph 10.b.  
16 deals with the disclosure of confidential documents  
17 to counsel in the action. Paragraph 10.b. prohibits  
18 disclosure to counsel in the action unless counsel  
19 has signed and executed the confidentiality agreement  
20 annexed to the protective order as Exhibit A, so to  
21 the extent that counsel in this room have not signed  
22 Exhibit A, I believe that the introduction of that  
23 document as an exhibit to this deposition was a  
24 violation of paragraph 10.b.. In addition, paragraph  
25 10.c. deals with the disclosure of confidential

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1 documents to persons whose depositions are being  
2 taken. To the extent that this deponent has not  
3 signed the confidentiality agreement annexed to the  
4 protective order as Exhibit A, the disclosure of that  
5 document to the deponent was a violation of the  
6 protective order.

7       There is also the issue of counsel for the state  
8 of Washington who is here. I believe that that's  
9 covered by paragraph 10.e. Again to the extent that  
10 counsel for the state of Washington has not signed  
11 the affidavit of compliance in the form attached  
12 hereto as Exhibit B to the protective order, it is a  
13 violation of the protective order. Again I think we  
14 have the issue of whether or not this document is  
15 also covered by the Washington's protective order,  
16 but putting that aside, what I would like to do is  
17 I'm going to ask that the portion of the transcript  
18 that is -- that deals with counsel's examination  
19 about this document be marked as confidential and  
20 sealed pursuant to paragraph 14 of the protective  
21 order, and that the exhibit itself be sealed pursuant  
22 to paragraph 14 of the protective order until such  
23 time as we get further direction from the court in  
24 how to deal with exhibits to the deposition  
25 transcripts that are confidential.

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1 MS. WIVELL: Mr. Bonner, let me just state  
2 for the record, first of all, counsel for the state  
3 of Washington is not here at my request, he is here  
4 at the request of Brown & Williamson who invited him,  
5 and I was given a general, I think Jack Fribley said,  
6 heads up that this invitation had been extended. I  
7 believe Ms. Walburn or someone from my office wrote a  
8 letter saying that that was fine with us as long as  
9 these kinds of matters that you're discussing right  
10 now were ironed out in advance, and I'm assuming -- I  
11 assumed that when counsel for the state of Washington  
12 arrived and no one objected on behalf of the  
13 defendants, that those matters had indeed been ironed  
14 out.

15 It was not my intention in any way to violate  
16 the court's order. If I did, I was unaware that I  
17 was doing so.

18 I also note that for the record we are deposing  
19 the corporation Brown & Williamson, and I'm just  
20 curious: Are you taking the position that we may not  
21 use confidential B.A.T. documents in depositions of  
22 Brown & Williamson?

23 MR. BONNER: Well I'm stating my objection  
24 for the record. I think that the paragraph 10 is --  
25 makes it clear that disclosure may not be made to

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1 counsel for any other party. So, yeah, for the  
2 purposes of preserving my objection today, I am  
3 taking that position. I think we can meet and confer  
4 and discuss that issue.

5 MS. WIVELL: Okay. I --

6 MR. BONNER: For purposes of today, I am  
7 taking that position, yes.

8 MS. WIVELL: Are you aware of this issue  
9 coming up in any other context so far in this  
10 litigation?

11 MR. BONNER: To my knowledge there have  
12 been no --

13 I have attended the Philip Morris 30(b)(6) or  
14 30.02(f) deposition. No confidential documents were  
15 offered as exhibits to that deposition, to the best I  
16 can recall. I know there's a deposition going on  
17 today for Lorillard, I believe, in North Carolina.  
18 It's also a 30.02(f). I have not heard that any  
19 confidential documents have been offered as exhibits,  
20 but then again, I haven't spoken to anyone who's --  
21 who's at that deposition today.

22 MS. WIVELL: I just want to make clear that  
23 we are willing to sit down and work out how to deal  
24 with this matter, since I, too, believe that this may  
25 have been the first time it has come up in the

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1 litigation and probably wasn't anticipated. Because  
2 I don't think that --

3 I personally don't believe that the court order  
4 anticipated not being able to use documents in  
5 depositions other than in -- at depositions. But  
6 we'd be more than happy to sit down and iron out this  
7 so that it doesn't happen again, and we'll address  
8 the issue of the Washington or any other attorneys  
9 for any other AG's cases at that time too. Okay?

10 MR. BONNER: That's fine.

11 MS. WIVELL: Okay.

12 MR. GETSINGER: This is John Getsinger. I  
13 just want to mention that American's deposition is  
14 coming up on Monday, and in the course of the  
15 designation of exhibits for that deposition there  
16 were a number of non-American documents designated,  
17 and I can't tell you as I sit here today whether they  
18 were confidential, but I suspect that some were. And  
19 it would be important, I think, that this be dealt  
20 with before Monday as far as American is concerned so  
21 that we have it ironed out before then.

22 MS. WIVELL: Well you're not concerned  
23 about non-American documents that aren't marked  
24 confidential being used in deposition; are you, sir?

25 MR. GETSINGER: No, no. Just confidential

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1 documents that may belong to other parties other than  
2 American.

3 MS. WIVELL: Well I will acquaint my  
4 colleagues back in Minneapolis with the fact that  
5 this issue has arisen. I'm not sure that I will be  
6 able to work it out before Monday, but I will make  
7 sure that the issue is brought to their attention.

8 MR. BONNER: Just so we're clear here, I'd  
9 also like to ask, if there's any copies of this  
10 exhibit currently sitting around the table, that they  
11 be collected up and handed back to counsel for  
12 plaintiffs.

13 MS. WIVELL: Well you want the court  
14 reporter's copy handed back to me?

15 MR. BONNER: No, the court reporter's copy  
16 is what's going to be marked as -- placed under seal  
17 pursuant to paragraph 14. I'm talking about any  
18 other copies that have been handed around the table  
19 to counsel.

20 MR. SOLIMANO: I was handed a copy, but I  
21 believe I returned it to you or someone else  
22 earlier.

23 MR. BONNER: That's correct.

24 MS. WIVELL: That's the court reporter's  
25 copy; he gets to keep that one.

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1 I'm not saying that this is -- that we concede  
2 this is an appropriate way to do it, but for the  
3 purposes of getting this deposition back on track,  
4 I'm willing to and have accepted the copy I gave to  
5 Brown & Williamson's counsel.

6 MR. SCHNEIDER: One other point on the same  
7 issue. And I agree that we should pay close  
8 attention to the requirements of the protective  
9 order, make sure that we are both tendering and  
10 sharing exhibits at these depositions in compliance  
11 with it and understand that this is, I think,  
12 probably the first time a confidential document has  
13 been used, so we need to make sure we work out our  
14 respective logistics with respect to that. In that  
15 connection, I note that Plaintiffs' Exhibit 17  
16 appears to be a printout of information from B&W's  
17 litigation database. That litigation database was  
18 produced and marked, appropriately, confidential.  
19 This printout from plaintiffs is not so marked. It  
20 should be so marked. We've already referred to it as  
21 being confidential and a document to be sealed in a  
22 similar manner to the documents that Mr. Bonner has  
23 identified. Thus far only B&W's counsel and the  
24 court reporter has a copy, and plaintiffs' counsel.  
25 The court reporter can keep it under seal. We will

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1 keep our copy. But I would respectfully request, Ms.  
2 Wivell, that you just make an arrangement to stamp --  
3 put a stamp on these documents that they're  
4 confidential.

5 MS. WIVELL: We can make arrangements to  
6 put a heading on them.

7 MR. SCHNEIDER: Thank you.

8 MS. WIVELL: And for the record, I did not  
9 provide copies of Exhibit 17 to anyone other than the  
10 court reporter, the witness, and Brown & Williamson's  
11 counsel.

12 MR. SCHNEIDER: I agree. And that's why I  
13 did not have to make the request to gather those. I  
14 appreciate you pointing that out. Thank you.

15 MR. SOLIMANO: Well in the interest of full  
16 disclosure, I will note that Exhibit 19, while not  
17 marked confidential, does say it's protected by the  
18 Minnesota protective order.

19 MR. SCHNEIDER: But it's not confidential,  
20 and therefore you, as a participant in Minnesota, I  
21 believe, can review it.

22 MR. SOLIMANO: Okay. Does everybody agree  
23 with that?

24 MR. FRIBLEY: If it's not marked  
25 confidential.

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1 MS. WIVELL: And just for record, when I  
2 hand you a document, I expect that you're going to  
3 pass it down the table for other counsel to share.

4 MR. SOLIMANO: My mistake.

5 MS. WIVELL: My mistake.

6 BY MS. WIVELL:

7 Q. All right. Getting back to the substance of  
8 this, we were talking about the risk management  
9 department before we went off the record. The risk  
10 management department communicates with Brown &  
11 Williamson's insurers; doesn't it?

12 A. Yes, it does.

13 Q. Has the risk management department provided  
14 Brown & Williamson's insurers with any reports on its  
15 risk analysis concerning smoking and health-related  
16 issues?

17 MR. SCHNEIDER: I'm going to object to the  
18 question on the grounds that it's outside the scope  
19 of today's proceeding.

20 MS. WIVELL: Go ahead.

21 MR. SCHNEIDER: I will instruct the witness  
22 not to answer.

23 MS. WIVELL: Mr. Schneider, the law is that  
24 I can inquire of this witness of matters outside the  
25 scope of the deposition notice. There is no

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1 limitation. It's not limited to what's in the  
2 notice, especially when it's prefatory to my next  
3 question, which is: If so, were those documents  
4 reviewed to see if they were responsive, and if so,  
5 were they produced.

6 MR. SCHNEIDER: All right. I don't agree  
7 with your assessment of the -- of the law, but let's  
8 get to the practical bottom line. Go ahead and ask  
9 the question.

10 MS. WIVELL: All right.

11 MR. SCHNEIDER: See how far afield we go.

12 BY MS. WIVELL:

13 Q. Has the risk management department provided  
14 Brown & Williamson's insurers with any reports on its  
15 risk analysis concerning smoking and health-related  
16 issues?

17 A. I don't know whether in the past we have  
18 provided such reports. It would not be the kind of  
19 report that would be provided in -- you know, while I  
20 have been within the department.

21 Q. Would that have been the responsibility of line  
22 management?

23 A. The issue of -- of smoking and health liability  
24 was not something which required us to make any  
25 representations to our insurers while I have been

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1 within risk management.

2 Q. All right. I'm not sure you answered my  
3 question though. Is that the responsibility,  
4 communicating the risk assessment of smoking and  
5 health relations to cigarettes, communicating that  
6 risk to insurers, is that the responsibility of line  
7 management?

8 A. Communications to insurers by and large were  
9 undertaken by the risk management department or by  
10 our insurance brokers, not by line management.

11 Q. Are you aware of any reports, whether or not  
12 they were written while you were with Brown &  
13 Williamson, communicating the risk to B&W's insurers?

14 A. Various communications have been made to  
15 insurers about our business risk, and if we had them  
16 in our files, they would have been considered as part  
17 of the review when the sweep was done of our  
18 corporate offices in 1996.

19 Q. You mentioned insurance brokers. What insurance  
20 brokers does B&W use?

21 A. Brown & Williamson's insurance broker of record  
22 is Johnson & Higgins.

23 Q. Was Johnson & Higgins queried to determine  
24 whether or not they had possession of any responsive  
25 documents?

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1 A. No, they were not. I -- I think I can  
2 characterize their types of inquiries that were made  
3 as part of the search for responsive documents. We  
4 looked in all Brown & Williamson files to find  
5 documents which may be responsive, we made reasonable  
6 inquiries of law firms to establish whether they may  
7 have documents which were responsive which they were  
8 holding on behalf of the company and which the  
9 company did not have, but we did not make inquiries  
10 of other organizations to establish whether they have  
11 responsive documents because they were not Brown &  
12 Williamson files. And I believe we communicated this  
13 to plaintiffs in this case at the outset that we  
14 wouldn't do that.

15 Q. Sir, did Brown & Williamson query its insurers  
16 about whether or not they had any responsive  
17 documents?

18 A. No, we did not.

19 Q. What is Eagle Star Insurance?

20 A. Eagle Star Insurance is a B.A.T. property and  
21 casualty insurer based in England.

22 Q. Did Brown & Williamson query Eagle Star  
23 Insurance to determine whether or not it had  
24 responsive documents in its files?

25 A. No, they did not.

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1 Q. Now Eagle Star Insurance did an epidemiological  
2 study in conjunction with Brown & Williamson; didn't  
3 it?

4 MR. SCHNEIDER: Object to the form.

5 A. I'm not aware of that.

6 Q. Would you make an inquiry and determine whether  
7 or not that is the case and report back to us  
8 tomorrow?

9 A. I'll consider that, that issue.

10 Q. Well will you do it or won't you do it?

11 A. I'll consider it and let you know.

12 Q. When will you let us know?

13 A. Tomorrow.

14 Q. And if you don't have the answer to that  
15 question, will Brown & Williamson provide a witness  
16 who will be able to answer that question?

17 A. If -- if my answer, my counsellor advises me, is  
18 a question that we can respond to, then we will make  
19 every effort to do so.

20 Q. Tomorrow.

21 A. We'll let you know the results of the review  
22 tomorrow.

23 Q. Thank you.

24 Defendant Brown & Williamson has had dealings  
25 with the Minnesota Candy & Tobacco Association;

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1 hasn't it?

2 A. I believe they have -- they did.

3 Q. Did Brown & Williamson inquire of that  
4 organization whether it had any responsive documents  
5 in their possession?

6 A. No, they did not.

7 Q. Did -- I'm sorry.

8 Brown & Williamson has had dealings with the  
9 Minnesota Convenience Store Association; correct?

10 A. I --

11 They may well have.

12 Q. Do you know whether Brown & Williamson asked  
13 whether that organization had responsive documents?

14 A. I believe they did not.

15 Q. What is the Bio Research Institute?

16 A. I don't know.

17 Q. Do you know whether or not its files were  
18 reviewed to see if there were responsive documents?

19 A. Searches were made of Brown & Williamson files,  
20 and as I said earlier, of outside counsel files to  
21 inquire as to whether they may have documents held  
22 for the company where there was reasonable grounds to  
23 believe that they may be the only copy of the -- of  
24 the company's record. Other than that, we did not  
25 search for records in third parties.

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1 Q. So the answer is that the Bio Research Institute  
2 was -- was not asked whether or not it had possession  
3 of responsive documents; was it?

4 A. I believe we did not.

5 Q. And is the same thing true of Microbiological  
6 Associates?

7 A. I believe we did not search them.

8 Q. How about Hazelton Labs?

9 A. I believe we did not search Hazelton Labs.

10 Q. Who is B&W's patent counsel?

11 A. I don't know who the patent counsel is.

12 Q. I'd like to talk for a bit about the kinds of  
13 files that Brown & Williamson did review. Were files  
14 reviewed from all throughout the company?

15 A. What we did is we set out to identify the main  
16 locations of the company, and we identified those  
17 which were likely to have responsive documents, and  
18 we did a thorough search of all of those locations to  
19 identify documents which may be responsive.

20 Q. And what locations did Brown & Williamson  
21 believe were most likely to contain responsive  
22 documents?

23 MR. SCHNEIDER: Objection.

24 A. If I can answer that, I would say that the  
25 activity was designed to look through all Brown &

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1 Williamson files to attempt to identify whether  
2 documents were responsive or not. It was done on a  
3 thorough basis across all our main locations.  
4 Clearly, one could speculate that a lot of responsive  
5 documents would -- would be in research and -- and  
6 development departments and so on, and those areas  
7 were included within the search.

8 (Plaintiffs' Exhibit 21 was marked  
9 for identification.)

10 BY MS. WIVELL:

11 Q. Sir, showing you what's been marked as  
12 Plaintiffs' Exhibit 21, it's an organizational index  
13 for Brown & Williamson Corporation; isn't it?

14 A. Yes, it is.

15 Q. Would you please take a look through it and see  
16 if it's complete.

17 A. It appears to be a complete document.

18 Q. Well, sir, let me ask you this: I see on the  
19 first page reference to the law department on page  
20 four. Do you see the reference to the law department  
21 on the first page?

22 A. Yes, I do.

23 Q. And it says that that department is described on  
24 page four?

25 A. Yes, I see that.

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1 Q. Do you find the law department anyplace in this  
2 document?

3 A. I don't find the law department in this  
4 document. I do, however, see that both Mick McGraw  
5 and Tony Burke are listed on page one as the  
6 executives, and Tony Burke heads up our law  
7 department.

8 Q. Sir, isn't it a fact that this document has  
9 pages four through approximately 18 or 19 which have  
10 just been omitted from it?

11 A. I'll have to say that the -- that appears to be  
12 the case. It's very hard to read the numbers in the  
13 copy.

14 Q. Is there any indication in this document that  
15 redactions were made to this document?

16 A. No, there's not that I have seen.

17 Q. Sir, you understand from reading the -- I'm  
18 sorry.

19 Have you read the court orders in this case?

20 A. Actually, if I may clarify earlier, I believe  
21 one of the issues -- one of the exhibits that you  
22 gave me was the first set of requests for production,  
23 and I believe I responded that I had seen this. On  
24 review, I may not have. I've seen very -- lots of  
25 documents like this and I have seen the requirements

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1 for documents outlined in the responses prepared by  
2 defense's counsel.

3 MS. WIVELL: Objection, move to strike,  
4 it's non-responsive.

5 Q. Sir, my question is: Have you read the court  
6 orders relating to document production in this case?

7 A. I believe that I have read the Case Management  
8 Order in this case.

9 Q. Does Brown & Williamson understand that if  
10 redactions are made to documents, those redactions  
11 are to be noted on the privilege log?

12 A. My understanding is that if redactions are made,  
13 then a separate log is made of those redactions with  
14 the reasons for that redaction.

15 Q. And they are included as part of the privilege  
16 log that's provided to plaintiffs in this litigation;  
17 correct?

18 A. I don't know whether they're a part of the  
19 privilege log or not.

20 Q. Well, have the redactions been provided to  
21 plaintiffs?

22 A. My understanding is that they have.

23 Q. Sir, there's --

24 But there's no indication in this document that  
25 anything was redacted. Pages were just removed;

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1 correct?

2 A. I can't speculate as to what happened to those  
3 pages. It appears that they're missing. There may  
4 have been an error in the production of this  
5 document, and I'm sure that we'll be happy to produce  
6 the missing pages for you.

7 Q. I'm going to represent to you that I have  
8 checked the privilege log to determine whether any  
9 redactions were made to this, and I find no reference  
10 to this document at all. Can you explain how that  
11 could happen?

12 A. I'm unable to give you an explanation in this  
13 specific case. I can say, however, that with so many  
14 documents being produced in such a short period of  
15 time in a major effort, some mistakes may occur.  
16 This may have been one. And we'll be happy to  
17 correct it.

18 Q. "Short period of time." This document  
19 production began in 1995; didn't it? Isn't that when  
20 plaintiffs served their -- their request for  
21 production of documents?

22 MR. SCHNEIDER: Objection.

23 A. Brown & Williamson, I think, has produced a  
24 large number of documents with less of a background  
25 of producing documents than -- than other defendants

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1 in this case, so we are starting from a -- a position  
2 with less -- less background and experience in this.  
3 And we have done a -- an excellent job to produce a  
4 large number of documents.

5 Q. Sir, I'm -- I'm not going to debate that here  
6 with you. I'm asking you to answer my question.

7 Maybe I should put it this way: When did Brown  
8 & Williamson start reviewing its files for responsive  
9 documents?

10 A. Brown & Williamson started the -- the efforts  
11 late in 1995, in the second half of 1995, I believe,  
12 for the Minnesota case.

13 Q. Let's go through this, and let me ask you:  
14 Looking at the executives that are listed on this  
15 document, which is dated 11-1-95, were the files of  
16 all of the people listed on page one reviewed for  
17 responsiveness?

18 A. My understanding is that all of the people on  
19 page one's files would have been reviewed, with the  
20 exception of Dick Green, who is located in Japan,  
21 Paul Wessel, who is located in Japan, and Hank  
22 Howells, who was in -- in Japan at the time, and  
23 Turquil MacLeod, who is in the Middle East.

24 Q. Were those individuals asked whether or not they  
25 had documents that were responsive to the requests in

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1 this case?

2 A. I -- I would expect that inquiry would have been  
3 made internally within Brown & Williamson with Dick  
4 Green, for example, to review whether Japan was  
5 likely to have responsive documents or not.

6 Q. Looking at the second page of the executive  
7 portion, were all of those individuals' files  
8 reviewed for responsiveness?

9 A. Yes, I believe they would have been.

10 Q. Turning to the next page of the document, which  
11 we have, that's Kohnhorst's direct reports; is that  
12 right?

13 A. That's correct.

14 Q. Were all of those documents -- I'm sorry. Were  
15 the files of all of those individuals reviewed for  
16 responsiveness?

17 A. Yes, I believe they were.

18 Q. Was Mr. Kohnhorst in the United States at the  
19 time that his files were reviewed?

20 A. I believe he was.

21 Q. Now in the --

22 According to the organizational index on the  
23 front of this document, we are missing information  
24 about the law department, the human resources  
25 department, the public affairs department, and the

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1 government affairs department; correct?

2 A. I have not searched through here for other

3 departments other than -- than law. Would you like

4 me to do that?

5 Q. Please do.

6 A. They don't appear to be here.

7 Q. All right. Let's chat about the law

8 department. Where is the law department located?

9 A. It's located within the Brown & Williamson

10 Tower.

11 Q. Are there any other locations where the law

12 department operates?

13 A. Not that I'm aware of.

14 Q. And I think you said earlier the files of the

15 law department were reviewed for responsiveness;

16 correct?

17 A. Yes, they were.

18 Q. Does Brown & Williamson have a vault at its

19 tower?

20 A. We have storage facilities and areas where we

21 keep items not in general use, yes.

22 Q. I'm sorry, you said items not in general use or

23 items in general use?

24 A. Not in general use.

25 Q. Those are secured facilities?

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- 1 A. There are access controls, yes.
- 2 Q. What do you mean by "access controls?"
- 3 A. Well it's not open to the general public.
- 4 Q. So if a person came walking in off the street,
- 5 they wouldn't have access to Brown & Williamson's
- 6 documents; would they?
- 7 A. No, they wouldn't.
- 8 Q. And one of the reasons for that is because
- 9 they're important company assets; right?
- 10 A. Yes, they are.
- 11 Q. Whether they're in general use or whether they
- 12 are stored for reference later on; right?
- 13 A. That's correct.
- 14 Q. The lawyers' offices and desk drawers were
- 15 searched for responsive documents?
- 16 A. The same process that was adopted to sweep
- 17 the -- the whole tower was used in the law
- 18 department.
- 19 Q. Was there a special group of people assigned to
- 20 the law department to determine whether or not there
- 21 were responsive documents?
- 22 A. My understanding is that they would be
- 23 attorneys, just the same attorneys as we used
- 24 elsewhere within the tower.
- 25 Q. Do you know who was assigned to the law

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1 department?

2 A. No, I do not.

3 Q. How would you find that out?

4 A. I understand that I could ascertain this by  
5 reviewing the list of which department was reviewed  
6 by whom and when.

7 Q. Who has those lists?

8 A. They were retained by King & Spalding.

9 Q. Were files that were in storage from the law  
10 department reviewed for responsiveness?

11 A. Yes, I believe they were.

12 Q. Now there is storage at various places in the  
13 Brown & Williamson Tower in Louisville; isn't that  
14 correct?

15 A. Documents are distributed around the tower,  
16 that's correct.

17 Q. And all of those documents were reviewed for  
18 responsiveness?

19 A. All of those documents were considered for  
20 responsiveness, that's correct.

21 Q. Now "considered" and "reviewed" are two  
22 different things. You would agree with me there;  
23 wouldn't you, sir?

24 A. I would characterize the -- the consideration as  
25 being one of an inquiry to an employee: Where do you

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1 keep your records which may be responsive in these  
2 categories? And if they are, then they were taken  
3 away for review.

4 Q. Let's talk about human resources. Was that  
5 department reviewed for responsive documents?

6 A. Yes, I believe it was.

7 Q. Where is that document -- department located?

8 A. Within the Brown & Williamson Tower.

9 Q. And were all employees at all levels of the  
10 human resources department queried about the  
11 existence of responsive documents?

12 A. I don't know. I know that an interview would  
13 have been held with the head of department to  
14 determine to what level of employee it was  
15 appropriate to conduct the review. That may or may  
16 not have included all employees in Brown & -- in --  
17 in human resources.

18 Q. You can't tell me one way or the other as you  
19 sit here today; can you, whether --

20 A. I don't know the answer now, no.

21 Q. How about the public affairs department, where  
22 is that located?

23 A. It's located within the Brown & Williamson  
24 Tower.

25 Q. And who's responsible for the public affairs

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1 department?

2 A. Well, Bob Pruitt is the director.

3 Q. And was the public affairs department queried as  
4 to whether there were responsive documents in its  
5 files?

6 A. Yes, I believe it was.

7 Q. What is the government affairs department?

8 A. Government affairs is the department I was  
9 referring to headed up by Bob Pruitt.

10 Q. So Mr. Pepples is no longer heading that  
11 department?

12 A. Ernie Pepples does -- does head that affair,  
13 that's -- that's right.

14 Q. I'm -- I'm sorry. I'm confused. Who heads that  
15 department, Pruitt or Pepples?

16 A. I've confused -- I've confused you.

17 Q. Yes.

18 A. Ernie Pepples is the senior executive VP with  
19 responsible for government affairs -- with  
20 responsibility for government affairs. Bob Pruitt is  
21 on a different floor other than 26, and he is the  
22 director of government affairs.

23 Q. Thank you.

24 Was the government affairs department searched  
25 for responsive documents?

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1 A. Yes, I believe it was.

2 Q. Were all of the employees in the government  
3 affairs department asked to search their files for  
4 responsive documents?

5 A. The inquiry would have been made of Bob Pruitt  
6 as to who to include within the scope of -- of the  
7 document sweep. And I don't know at what level of --  
8 of employee the interviews were conducted. I can say  
9 that, given that interviews were conducted with 840  
10 people within Brown & Williamson, large numbers of  
11 employees were interviewed as part of this process.

12 Q. Were these interviews recorded?

13 A. Interview notes were taken, I believe, by the  
14 attorneys.

15 Q. But were the interviews themselves actually  
16 recorded on audio tape?

17 A. I don't believe they were.

18 Q. But attorneys who took the interviews took notes  
19 of what was said during those interviews; correct?

20 A. I believe they took notes during the interview  
21 process.

22 Q. Where are those notes located?

23 A. I believe they'd be with the outside attorneys.

24 Q. Do you know for a fact that they are with the  
25 outside attorneys?

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1 A. I don't know for a fact.

2 Q. Would you inquire and then report back to us  
3 tomorrow morning?

4 A. I'll do that.

5 Q. Thank you.

6 Continuing on with Plaintiffs' Exhibit 21, I'm  
7 not sure I can correctly say that gentleman's name.  
8 Do you know how to say it, the next one under  
9 Pepples?

10 A. Schoenbachler.

11 Q. And what department does he have under his  
12 direction?

13 A. Mr. Schoenbachler is CFO, so he's responsible  
14 for finance and IT departments.

15 Q. IT, International Accounting?

16 A. Information Technology.

17 Q. Looking down --

18 Or could you turn, pardon me, to page 12, to the  
19 first of his -- I'm sorry, it looks like page nine,  
20 to the first of his pages. That's -- I'm sorry.  
21 That's confusing with the omission of these pages. I  
22 apologize.

23 Let's go to the page entitled "Specialty  
24 Markets." Do it that way, it's easier, less  
25 confusing. Do you have in front of you the page

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1 entitled "Specialty Markets" that's Bates numbers  
2 510310860.

3 (Discussion off the stenographic record.)

4 A. Yes, I do.

5 Q. Okay. What are specialty markets?

6 A. This is the marketing arm that is responsible  
7 for our smokeless-tobacco products.

8 Q. And were the people who are listed on this page  
9 queried to determine whether or not they had any  
10 responsive documents?

11 A. To the extent that they were resident in and  
12 working out of Louisville, and to the extent that  
13 they were, the head of the department advised that  
14 they were appropriate people, they may have  
15 responsive documents, then they would have been  
16 included within the sweep process.

17 Q. Which of these people are resident out of  
18 Louisville?

19 A. Glen Stone, Clark Montgomery and Bob -- no, Bob  
20 Baker, I believe, is in -- is resident in Louisville.

21 Q. So those are the three people who have been  
22 included, and the others would have been excluded?

23 A. No. I believe Glen Stone and Clark Montgomery  
24 are resident outside Louisville and may not have been  
25 incorporated within the sweep.

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1 Q. I'm sorry, I just misheard.

2 So the only person on this page who would have  
3 been included within the sweep is Bob Baker?

4 MR. SCHNEIDER: Object to the form.

5 A. No, my -- my response is that interviews would  
6 have been conducted with Karen Brotzge, Irv Otte and  
7 Mike Diven, and a determination made as to who within  
8 their departments were holding documents and should  
9 be -- should be reviewed for responsive documents,  
10 and based on their determination, interviews would  
11 have been held with their direct reports.

12 Q. Is there a list of who all was interviewed?

13 A. Yes, there is.

14 Q. You saw it in preparation for your deposition  
15 today?

16 A. I did see it.

17 MS. WIVELL: We could short-circuit this  
18 process by quite a lot if you would produce that list  
19 for us.

20 MR. SCHNEIDER: And Ms. Wivell, you're  
21 directing your question to me.

22 MS. WIVELL: I am.

23 MR. SCHNEIDER: And I think appropriately  
24 so. That is a document that was prepared for  
25 litigation. I want to give consideration to your

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1 request and I will do so overnight, let you know what  
2 our decision is on that.

3 MS. WIVELL: All right. Well then I'm  
4 going to step away from this document, because if we  
5 could have that at the deposition tomorrow, it most  
6 assuredly would save us going through the rest of  
7 Exhibit 21. I think that would save a considerable  
8 lot of time.

9 Q. Does it contain anything other than the names of  
10 people who were interviewed?

11 A. The log that I saw?

12 Q. Yes, sir.

13 A. Yes, it does.

14 Q. What else does it contain?

15 A. I can recall that it -- it contains the date of  
16 the interview, and I believe it also contains the  
17 attorneys associated -- reference to the attorneys  
18 who were associated, and it contains of the name of  
19 the department, and perhaps it has locations and it  
20 has specific functions within departments within it  
21 as well.

22 Q. Was this a computerized index that you saw?

23 A. I saw a printout. I don't know whether it was  
24 computerized or not.

25 Q. All right. Well why don't we step away from

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1 that until Mr. Schneider gets back to me, because it  
2 certainly would be a help if we could just have that  
3 list. I wouldn't have to go through this in  
4 excruciating detail.

5 Let me ask you about the -- the files of these  
6 people that we've been talking about. There were a  
7 variety of different kinds of documents contained  
8 within those files; right?

9 A. Yes, there were.

10 Q. And those were documents which Brown &  
11 Williamson employees used as part of their business;  
12 correct?

13 A. Yes.

14 Q. And they were files which the defendant's  
15 employees regularly kept as part of their doing  
16 business; weren't they?

17 MR. SCHNEIDER: Objection to form.

18 A. Yes.

19 Q. And the files -- actual file cabinets were  
20 reviewed and files pulled out; correct?

21 A. Yes, they were.

22 Q. And those file cabinets contained documents  
23 where individual employees kept files they regularly  
24 used as part of doing their jobs at Brown &  
25 Williamson; right?

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1 A. That's correct.

2 Q. What were some of the different kinds of  
3 documents that the defendant found in its sweep  
4 looking for responsive documents?

5 A. Well we have produced, I think, in excess of  
6 four million documents considered responsive in this  
7 case, and that's a wide-ranging variety of -- of --  
8 of documents.

9 Q. I'm not asking for a number, I'm just asking for  
10 types that you're aware of, types of documents that  
11 defendant produced.

12 A. Well there are types of -- of documents which  
13 were considered responsive to the requests in the  
14 Minnesota case.

15 Q. I'm not being clear, and it may be the lateness  
16 of the hour and I apologize for that. But there were  
17 memos kept and produced; correct?

18 A. Memos, reports, and those kind of things.

19 Q. And these were documents, memos, reports that  
20 were created by Brown & Williamson employees or  
21 people working for Brown & Williamson as part of  
22 Brown & Williamson's doing business; right?

23 MR. SCHNEIDER: Objection to the form.

24 A. Some of them were of that nature, yes.

25 THE REPORTER: We have to go off the record

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1 to change tape. Off the record, please.

2 (Recess taken.)

3 BY MS. WIVELL:

4 Q. There were documents that Brown & Williamson  
5 received from research labs, reports that they hired  
6 to be done that were produced as part of this  
7 discovery; weren't there?

8 A. That's correct.

9 Q. And those reports from research labs were  
10 documents that Brown & Williamson asked to be done as  
11 part of its business; correct?

12 A. That's correct.

13 Q. And Brown & Williamson regularly contracts with  
14 outside labs as part of its business activities to  
15 produce reports for it; correct?

16 MR. SCHNEIDER: Object to the form.

17 A. Yes, they do.

18 Q. And defendant makes public statements from time  
19 to time about cigarettes; right?

20 A. Yes, Brown & Williamson does.

21 Q. And it does so as part of its regular business  
22 practice; doesn't it?

23 A. That's correct.

24 Q. And those are some of the kinds of documents  
25 that were produced in this case; correct?

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1 A. I'm sure some of them were, yes.

2 Q. And in order to make --

3 Brown & Williamson wanted those statements that  
4 it makes to the public to be factual and accurate;  
5 didn't it?

6 MR. SCHNEIDER: Objection to the form.

7 A. Yes, I believe that would be the case.

8 Q. Well let me rephrase the question so I can meet  
9 counsel's objection.

10 Brown & Williamson wanted the statements it made  
11 to the public to be factual; correct?

12 A. There may be some statements that Brown &  
13 Williamson would make to the public which are not  
14 factual. They may be, you know, opinions or  
15 whatever.

16 Q. But they wanted them to be accurate statements  
17 when they made statements to the public; wouldn't  
18 they?

19 A. As a general matter, yes, Brown & Williamson is  
20 an ethical company and seeks to make statements which  
21 are factually correct, yes.

22 Q. And in order to do that it collected facts from  
23 people and organizations who were knowledgeable about  
24 that fact -- about those facts; correct?

25 A. I don't really understand the question. We

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1 collected documents.

2 Q. And those documents contained facts; right?

3 A. Documents contained facts.

4 MR. SCHNEIDER: Object to the form.

5 Q. And it collected those documents as part of its  
6 business of making and selling cigarettes; right?

7 A. We collected documents which were responsive in  
8 the Minnesota case as part of the discovery process.

9 Q. And the documents which were produced to us were  
10 part of those that had -- that Brown & Williamson had  
11 collected as part of its business process over the  
12 last more than 40 years; right?

13 A. That's correct.

14 Q. Now sometimes Brown & Williamson's employees  
15 would write memos to one another; right?

16 A. Naturally.

17 Q. And they would keep those in their files so  
18 that, as time passed, they could go back and remind  
19 themselves about what they'd done before.

20 A. That's correct.

21 Q. And the employees exchanged memos from time to  
22 time.

23 A. Yes, they did.

24 Q. And these memos would be written as part of the  
25 regular business activity at Brown & Williamson;

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1 right?

2 A. That's correct.

3 Q. And these memos were sometimes put in to  
4 defendant's files and then produced 40 years later  
5 after they were written; correct?

6 A. That is the case.

7 Q. One of the purposes of such memos was so that  
8 the employees could do a better job; right?

9 MR. SCHNEIDER: Object to the form.

10 A. That's correct.

11 Q. Now employees within Brown & Williamson would  
12 also write reports to one another from time to time;  
13 correct?

14 A. Yes, they would.

15 Q. In fact, we talked about earlier that there is a  
16 policy at Brown & Williamson that when multiple  
17 people get copies of reports, it's the person who  
18 generates that report who's supposed to keep it;  
19 right?

20 A. That's correct.

21 Q. Why are they asked to keep a copy of the  
22 document?

23 A. They're asked to keep copies of documents which  
24 are required in the ordinary course of business, and  
25 for business purposes and because they're needed

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1 by -- for legal purposes, tax reasons, audit reasons  
2 and so on.

3 Q. And sometimes in the ordinary course of  
4 business, defendant's employees would meet with  
5 employees from other cigarette companies, and after  
6 those meetings they would write memos about what  
7 happened; correct?

8 MR. SCHNEIDER: Objection to the form.

9 A. I can speculate that that may have happened from  
10 time to time, yes.

11 Q. Have you written memos about meetings with  
12 insurers, for example, in obtaining insurance  
13 coverage for Brown & Williamson that you then put for  
14 business reasons into the files of Brown &  
15 Williamson?

16 A. Yes, I have.

17 Q. And sometimes those memos are circulated to  
18 other B&W employees; aren't they?

19 A. Yes, they are.

20 Q. And those memos are then kept in the ordinary  
21 course of business as part of defendant's files;  
22 right?

23 A. That's correct.

24 Q. Now sometimes you would send letters to the  
25 insurance company in trying to place insurance;

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- 1 right?
- 2 A. That's correct.
- 3 Q. And those letters would go into your files;
- 4 right?
- 5 A. Yes, they would.
- 6 Q. And similarly, other Brown & Williamson
- 7 employees would write letters outside the company and
- 8 those letters would become part of the records which
- 9 were kept in the ordinary course of Brown &
- 10 Williamson's business; right?
- 11 A. Yes, they would.
- 12 Q. Sometimes agreements like insurance contracts
- 13 are entered into by Brown & Williamson employees on
- 14 behalf of the corporation; correct?
- 15 A. That's correct.
- 16 Q. And those also become part of the files which
- 17 are kept in the ordinary course of business; right?
- 18 A. Yes, they do.
- 19 Q. There are other kinds of agreements which --
- 20 which B&W employees enter into on behalf of the
- 21 corporation; right?
- 22 A. There are.
- 23 Q. And one such agreement is that pooling agreement
- 24 that Brown & Williamson has with B.A.T.; correct?
- 25 A. I believe there is a pooling agreement, yes.

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1 Q. And that was entered into in the ordinary course  
2 of business; right?

3 A. Yes, I believe it was.

4 Q. And as part of that pooling agreement, Brown &  
5 Williamson was entitled to receive certain documents,  
6 certain research and development reports from B.A.T.;  
7 right?

8 A. I've not prepared myself to answer specifically  
9 on what's contained in the pooling agreement. I can  
10 tell you that it was a practical matter of obtaining  
11 efficiencies in, you know, research and development  
12 activities that results may be shared between, you  
13 know, affiliated companies, and the pooling agreement  
14 was a question of optimizing our cost management  
15 related to research and development.

16 Q. I understand. And the only reason I'm -- I'm  
17 referring to it is to establish that B&W, as part of  
18 that agreement, had a right to get certain kinds of  
19 documents from B.A.T. Industries; right?

20 MR. SCHNEIDER: Objection to the form.

21 A. That's correct.

22 Q. And you know from reading B&W's interrogatory  
23 answers that there were hundreds of research reports  
24 which were obtained in the ordinary course of  
25 executing that pooling agreement from B.A.T.; right?

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1 A. I -- I know that there were B.A.T. research  
2 documents within Brown & Williamson files which have  
3 been -- some of which have been produced in this  
4 case, that's correct.

5 Q. And you understand that those came to B&W as  
6 part of that pooling arrangement in the ordinary  
7 course of -- of executing that agreement; right?

8 A. I don't know that.

9 MR. SCHNEIDER: Object to form.

10 A. I don't know that for sure.

11 Q. Brown & Williamson has an R&D library; doesn't  
12 it?

13 A. Yes, it does.

14 Q. Where is that library currently located?

15 A. I believe it's in Macon, Georgia.

16 Q. Why does B&W keep an R&D library?

17 A. For reference purposes, to support our research  
18 and development activities.

19 Q. It's kept as part of the ordinary course of  
20 Brown & Williamson's business; isn't it?

21 A. Yes, it is.

22 Q. And there are R&D reports that are typically  
23 kept in the R&D library; aren't there?

24 A. That's correct.

25 Q. By the way, is all of the library open to every

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1 B&W employee?

2 A. I don't believe it is.

3 Q. Are all of the reports available to every R&D  
4 employee?

5 A. I don't know.

6 Q. Now one of the reasons Brown & Williamson keeps  
7 scientific reports -- no, let me back up. Start  
8 again.

9 Why does Brown & Williamson have an R&D  
10 department?

11 A. In order to optimize the quality of our  
12 products.

13 Q. Any other reason?

14 MR. SCHNEIDER: Again, I'm going to object  
15 to this line of questions, but -- on the grounds it's  
16 outside the scope, but if it's laying a foundation, I  
17 want to be practical about it, so let's see where it  
18 goes.

19 A. Well the research is undertaken on products to  
20 ensure that we comply with legal requirements, that  
21 the quality of the product is in accordance with what  
22 the consumer needs and in accordance with company  
23 standards and various other activities.

24 Q. And also are R&D projects kept in order to try  
25 and obtain patents for various projects that are

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1 developed?

2 A. That may be the case, yes.

3 Q. That is the case; isn't it?

4 MR. SCHNEIDER: Objection, argumentative.

5 A. That may be the case. I -- I -- I'm not an  
6 expert on, you know, what R&D research is retained.

7 Q. But the reports that we're talking about are  
8 reports that were generated in the ordinary course of  
9 Brown & Williamson's business; isn't that true?

10 MR. SCHNEIDER: Objection to the form.

11 A. We've -- we've said there are -- there are  
12 research and development reports which are developed  
13 and retained in the ordinary course of business.

14 Q. Well Brown & Williamson also did research  
15 because it had a duty to keep abreast of the possible  
16 hazards imposed by its product; isn't that true?

17 MR. SCHNEIDER: Object to the form. And in  
18 addition, object as it's being outside the scope.  
19 This witness has not been designated to talk about  
20 the purpose and operation of the research and  
21 development department, he's here to talk about  
22 document production and collection. Again, if this  
23 is a foundational question, I'm willing to let it  
24 proceed, but he's not designated as a company  
25 spokesperson on that topic.

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1 MS. WIVELL: Go ahead.

2 A. Can you repeat the question, please?

3 Q. Brown & Williamson also did research because it  
4 had a duty to keep abreast of the possible hazards  
5 imposed by its product; isn't that true?

6 A. I understand that we've done research for events  
7 like trying to develop an allegedly safer cigarette  
8 from time to time.

9 Q. I'm not sure if you've answered my question.  
10 Did Brown & Williamson do research because it  
11 recognized it had a duty to keep abreast of possible  
12 hazards associated with its products?

13 MR. SCHNEIDER: Objection to the form.

14 A. And my response was I'm aware of one  
15 circumstance where research is being conducted in to  
16 trying to develop cigarettes which are less  
17 combustible and for reasons of potential legal  
18 constraints on our product in the future.

19 Q. Well let me put it this way: Did B&W recognize  
20 it had a duty to keep up with pertinent scientific  
21 advances relating to smoking and health?

22 MR. SCHNEIDER: Objection, reiterate  
23 earlier objection.

24 A. I believe that's the case.

25 Q. And it kept records of that research; didn't it?

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1 A. There are large numbers of records kept in  
2 research and development relating to research that's  
3 been done. If it was relating to smoking and health  
4 issues, I'm confident that those kinds of records  
5 have been kept for many, many years going back for a  
6 long period of time, and that if they were reviewed  
7 and considered responsive, they would have been  
8 prepared and submitted in this case, unless they were  
9 privileged.

10 Q. Sir, can you find my letter of March 25th which  
11 we have marked as an exhibit.

12 A. I have it.

13 Q. In light of your -- your immediate response, did  
14 Brown & Williamson produce a document referencing  
15 research done at the Wisconsin Alumni Research  
16 Association or the Wisconsin Alumni Research  
17 Foundation which is referred to at page four of  
18 Exhibit 18?

19 MR. SCHNEIDER: I object to the question.  
20 It refers to something that's drawn from the 4A  
21 index. It's referred -- it references a letter dated  
22 March 25, 1997 that itself is not marked  
23 appropriately as confidential.

24 MS. WIVELL: It's my letter, counsel.

25 MR. SCHNEIDER: I understand. But when you

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1 include -- when you make reference to confidential  
2 information in that manner, you are required to mark  
3 it as confidential.

4 But the point is, I object to the question,  
5 given the substance of it, and would ask that we  
6 circumscribe this area of questioning while counsel  
7 for the state of Washington is present.

8 MS. WIVELL: I'm going to ask him to  
9 leave.

10 MR. SOLIMANO: Okay.

11 (Mr. Solimano leaves the deposition room.)

12 BY MS. WIVELL:

13 Q. Sir, just to refresh your recollection about  
14 where you are, you had testified that you were  
15 confident that records had been kept for many, many  
16 years going back for a long period of time, and if  
17 they were reviewed and considered responsive, they  
18 would have been prepared and submitted in this case  
19 unless they were privileged. Is that the essence of  
20 your last answer?

21 A. Yes, I believe it is.

22 Q. All right. In light of that, was the  
23 information concerning research done at the Wisconsin  
24 Alumni Research Association or the Wisconsin Alumni  
25 Research Foundation produced in this litigation?

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1 MR. SCHNEIDER: Objection to the form.

2 A. I cannot answer specifically as to whether those  
3 specific documents have been produced or not. I can  
4 tell you that since it says these are documents that  
5 were listed on the 4A index, they would have been  
6 reviewed on a document-by-document basis by our  
7 outside counsel as part of preparing the response to  
8 the Minnesota requirements, and a determination would  
9 have been made at that time as to whether they were  
10 responsive or not. If they were determined to be  
11 responsive, they would have been provided to you by  
12 31 December 1996, unless it was considered that they  
13 may be privileged at that time.

14 Q. Will you find out whether the document has been  
15 produced or listed on the privilege log and report  
16 back to us tomorrow?

17 A. I will -- I -- I can tell you whether this  
18 was --

19 I can attempt to try and find out whether these  
20 were considered responsive, and I will try and find  
21 out whether they are considered privileged or not.  
22 Yes.

23 Q. All right. Thank you.

24 MR. SVOBODA: Are you through with that  
25 line of inquiry?

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1 MS. WIVELL: Yeah. You can ask him to come  
2 back.

3 (Mr. Solimano reenters the deposition  
4 room.)

5 BY MS. WIVELL:

6 Q. Sir, the documents that we've been talking about  
7 which were produced in response to plaintiffs'  
8 request are not documents that, for the most part,  
9 B&W shares with the public on a regular basis; are  
10 they?

11 A. For the most part, that would be correct.

12 Q. And you understand that -- that B&W considers  
13 its documents that it produced to the plaintiffs to  
14 be so important that they even asked the court to  
15 place notations that they're protected by a  
16 protective order; right?

17 A. I understand that we treat security over our  
18 documents as an important issue, yes.

19 Q. Why is security over your documents an important  
20 issue?

21 A. Because our documents are important to us, their  
22 information is important to us in running our  
23 business, and some of this is sensitive which we  
24 wouldn't want competitors to -- to -- to be able to  
25 see, for example.

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1 Q. One reason is you're afraid of industrial  
2 espionage; aren't you?

3 A. That's correct.

4 Q. And would it be fair to say that in the last 50  
5 years of Brown & Williamson's history, that the  
6 average -- if the average citizen had wanted to walk  
7 in off the street and take a look at the documents  
8 that we've been talking about today, they wouldn't  
9 have been able to; would they?

10 MR. SCHNEIDER: Object to the form.

11 A. I think that's a very broad question. As I said  
12 before, the company has adopted security arrangements  
13 to make sure that the general public doesn't have  
14 access to its records, yes.

15 Q. And -- and that applies equally to all of the  
16 locations we've been talking about today; doesn't it?

17 A. It applies with different levels of security.  
18 But yes, generally speaking, we take steps to secure  
19 our premises.

20 Q. The average person isn't going to be allowed to  
21 walk in and look at the R&D files in Macon; are they?

22 A. That's correct.

23 Q. Are you aware of any circumstance where someone  
24 has gotten in to the files and added anything to the  
25 files?

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- 1 A. I'm not aware of any circumstance like that.
- 2 Q. Is Brown & Williamson aware of any circumstance?
- 3 A. I can't speculate that there hasn't been, in a
- 4 hundred years of doing business, a circumstance where
- 5 such an event might have happened, but I'm not
- 6 generally aware of it, not really.
- 7 Q. It's speculation at this point; isn't it?
- 8 A. Yes.
- 9 Q. How would security people know if an outsider
- 10 was trying to walk in to the Louisville tower?
- 11 A. There are guards on the entrance that would
- 12 prevent such an event, and access is controlled
- 13 through card system for employees. Visitors have to
- 14 sign in.
- 15 Q. And does every employee have an I.D. card?
- 16 A. Every employee should have an I.D. card, that's
- 17 correct.
- 18 Q. Are these --
- 19 Are you required to wear these I.D. cards?
- 20 A. Yes, you are.
- 21 Q. Outside so they can be seen?
- 22 A. Yes, you are, while you're within Brown &
- 23 Williamson premises.
- 24 Q. Is that the same for all the Brown & Williamson
- 25 facilities?

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1 A. I believe it is.

2 MS. WIVELL: Why don't we break for the  
3 day.

4 THE REPORTER: Off the record, please.

5 (Deposition recessed at 5:09 o'clock p.m.)

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1 C E R T I F I C A T E

2 I, Richard G. Stirewalt, hereby certify  
3 that I am qualified as a verbatim shorthand reporter;  
4 that I took in stenographic shorthand the testimony  
5 of RICHARD M. LOWTHER at the time and place  
6 aforesaid; and that the foregoing transcript  
7 consisting of pages 1 through 262 is a true and  
8 correct, full and complete transcription of said  
9 shorthand notes, to the best of my ability.

10 Dated at Washington, D.C., this 10th day of  
11 April, 1997.

12

13

14

15 RICHARD G. STIREWALT

16 Registered Professional Reporter

17 Notary Public

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1 C E R T I F I C A T E

2 I, RICHARD M. LOWTHER, the deponent, hereby  
3 certify that I have read the foregoing transcript  
4 consisting of pages 1 through 262, and that said  
5 transcript is a true and correct, full and complete  
6 transcription of my deposition except:

7

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14

15 RICHARD M. LOWTHER

16 Deponent

17

18 Sworn and subscribed to before me this day  
19 of , 1997.

20

21

22

23 Notary Public

24

25 My commission expires .

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